COURT OF APPEAL CASES

OF CEYLON:

BEING

Reports of Cases decided by the Supreme Court of Ceylon in its Original and Appellate Jurisdiction, and sitting as a Colonial Court of Admiralty and by His Majesty's Privy Council on Appeal from Ceylon.

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SUPREME COURT.

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REPORTS OF CASES DECIDED BY THE SUPREME COURT OF CEYLON IN ITS ORIGINAL AND APPELLATE JURISDICTION AND SITTING AS A COLONIAL COURT OF ADMIRALTY AND BY HIS MAJESTY'S PRIVY COUNCIL ON APPEAL FROM CEYLON.

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ISMAIL LEBBE *v.* UDUMA LEBBE *et al.*

No. 3,653, D. C., Kalutara.

Present: **Middleton & Wood Renton, JJ.**

17th January, 1912.

Evidence Ordinance No. 14 of 1895 §§ 13 & 43—previous judgment not inter partes—a "transaction or instance"—how far relevant in subsequent litigation—res inter alios acta—res judicata.

None of the provisions of the Evidence Ordinance were intended to subvert the principle *res inter alios acta alteri nocere non debet.*

A judgment not admissible in evidence under § 43 of the Evidence Ordinance could only be admissible under § 13 to prove litigation on the claim made, that is to say, the assertion or denial of the custom or right in question which constitutes a transaction or particular instance within the meaning of § 13. It cannot be used to prove that the litigation was decided in favour of one party rather than the other, nor are its reasons relevant, and it is not to be relied on to show by itself in a subsequent litigation that either of the parties were right or wrong in their assertion or denial of the claim litigated or adjudicated upon.

This is a partition action in which a contest arose respecting a $\frac{1}{3}$ share of a field, marked Lot 1 in plan W 3, between

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the appellant, who is the 14th defendant, and the respondents, who are the 11th-13th and the 32nd-36th defendants. The former claimed title by right of inheritance from the original owner, while the latter claimed the same share by right of prescription. The ancestors of the respondents had entered upon a portion of the field in dispute on a notarial deed, which was partly a lease and partly a planting agreement, from one Sultan Marikar, who owned a $\frac{1}{3}$ share of the field; but in action No. 2,092 instituted in the District Court of Kalutara in the year 1900 by certain purchasers from Sultan Marikar for a declaration of title some of the respondents and their predecessors in title successfully pleaded a prescriptive title to Sultan Marikar's rights. In the present action also the respondents claimed to be entitled to Sultan Marikar's $\frac{1}{3}$ share by prescriptive possession. At the trial the depositions of some of the witnesses in action No. 2,092 were read in evidence, but not the judgment, and the District Judge *(Paul Pieris, Esq.)* held as follows :—

"There can be no doubt that the clients of Mr. Wijemanna (11th-13th) and Mr. D. Gunetilleke (the 31st-36th defendants) have cultivated for 50 years Lot [1] in W [3] That is exactly what they were entitled to do under W [1] ; and it is nonsense to speak of prescription after that."

From this judgment the present respondents appealed, and at the appeal it was contended that the District Judge had ignored the judgment in D. C. 2,092 in which it had been held that the respondents had obtained a title by prescription against the transferees of the grantor of W [1]. The Supreme Court set aside the judgment of the District Judge and sent the case back remarking :—

"As it is important that the title of the parties in this complicated case should be clearly ascertained, we think that the present course will be to set aside so much of the decree as allots. $\frac{1}{3}$ of the land to the 14th defendant and remit the case to the District Judge to adjudicate on the claim of the appellants and the 14th defendant to Lot [1] in W [3] having regard to the effect thereon of the judgment in action No. 2092."

When the case went back the judgment in action 2,092 was read in evidence, some further evidence was recorded,

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and the District Judge gave judgment for the respondents in these terms :—

"At the trial it was agreed that the evidence already recorded by my predecessor should be read in evidence.

The further evidence recorded is very little. 13th defendant has put in a copy of the judgment of the Supreme Court in case 2,092 with the evidence of three witnesses. One of these witnesses, Uduma Lebbe, has also been called as a witness. The 14th defendant relied on the evidence of the P. V. and Isi Lebbe already examined, and called no further evidence. I have gone through the previous evidence recorded, and I see no reason to dissent from my predecessor's remarks in his judgment on the question of possession. He said : "There can be no doubt whatever that the clients of Mr. Wijemanna and Mr. D. Gunetilleke have cultivated for 50 years Lot 1 in W 3," This fixes the identity of the land and disposes of the contention of 14th defendant that what the defendants possessed was outside the land surveyed to the east. The predecessor went on to say : "That is exactly what they were entitled to do under W 1, and it is nonsense to speak of prescription after that." This is the part of the judgment from which the defendants dissent and on which I am asked to decide in the light of the fresh evidence now adduced. This fresh evidence consists of the proceedings in 2,092 already mentioned. These proceedings clearly established the right of 12th and 13th defendants and the father of 11th defendant (Siyadoris) to lot No. 1 in the present survey, representing the eastern 7 acres of the land. The present 15th defendant was 1st plaintiff in that case, and he was therefore bound by it. The 14th defendant was not however a party. It is not therefore *res judicata* as far as he is concerned. It seems to me however an extremely strong piece of evidence against him. The same facts which were before the Judge in the previous case are before me now. No new facts appear to have come to light. The previous history of the land which influenced the decision in the previous case is the same now, and 14th defendant has not shewn why it should not have the same influence over my judgment.

I find therefore that the 11th-13th and 31st-36th defendants have obtained a prescriptive possession of the land. I therefore decree that they be declared entitled to the $\frac{1}{3}$ already decreed to the 14th defendant and direct that the interlocutory decree be amended accordingly."

From the judgment the 14th defendant appealed.

E. W. Jayewardene for the 14th defendant-appellant.—The judgment in D. C., Kalutara, 2,092 was not admissible in evidence as against the appellant, as he was not a party to that action, nor were the depositions of the witnesses

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in that case admissible. A judgment in a case would only bind the parties to it and their privies but not third parties. The judgment in action 2,092 merely decided that the respondent had acquired a title by prescription against the transferees of Sultan Marikar. Surely that would not bind the appellant. As appears from the judgment, the District Judge has surrendered his own judgment and has adopted in its entirety the judgment in 2,092.

[*Middleton, J.*—We should like to hear the other side.]

A. St. V. Jayewardene, for the defendants-respondents, contended that as these grounds of appeal were not taken in the lower Court or in the petition of appeal they should be rejected.

A judgment, though not between the same parties, was relevant under § 13 as a transaction in which the right in dispute was claimed and recognized. If the Court was going to allow the argument on the new point raised, he asked for an adjournment.

The argument was accordingly adjourned.

On resumption at a later date (17-12-11).

A. St. V. Jayewardene, for the respondents.—In the previous case No. 2,092 a right to the property by prescriptive possession was "claimed", "asserted", and "recognized". The previous litigation is an "instance" within the meaning of § 13 (*b*) of the Evidence Ordinance.

The Privy Council has held in several cases that previous litigation although not *inter partes* is relevant in a subsequent action. In *Rameshur Pershad Narain Singh v. Kungbehari Pathick* [1] criminal proceedings not *inter partes* and an agreement entered into between persons who were not parties to the suit were held admissible to explain the character of the enjoyment to the property which is the subject-matter

1. *(1878) 4 Cal. 633.*

of this suit, *Rambahadar Singh v. Luch Koer* [1]. In *Ram Rangan Chakerbati v. Ram Narain Singh* [2], in which a question regarding the amount of rent payable was raised, and the defendants submitted a decree in a previous case to which the plaintiff was no party, their Lordships observed "that although the predecessors of the plaintiff were no party to that litigation, it was competent to use the judgment as evidence showing the rent paid for the possession at and *prior to that date* now nearly 80 years ago". The words "prior to that date" are to be noted. In *Bitto Kunwar v. Kesho Pershad Missier* [3] their Lordships upheld the same principle remarking: "This decision is not conclusive against Bacha Tewari as the suit was not between the same parties as the present suit," but their Lordships agree with the Subordinate Judge that it was evidence against him. A different view had been held by the Full Bench in Calcutta; but in *Tépu Khan v. Rajairi Mohun Das* [4] (also a Full Bench case) Sir Francis MacLean said "But as the two cases decided by the Full Bench in this Court, the case of *Gugga Lall v. Fatteh Lall* [5] and the later case of *Surendra Nath Pal Chowdry v. Broji Nath Pal Chowdry* [6] have been referred to, I feel bound to express my opinion that having regard to the recent observations of the Privy Council in the case of *Ram Ramjan Chakerbati v. Ram Narain Singh* [2] and in the more recent case of *Bitto Kunwar v. Kesho Pershad* [3] the Full Bench decisions referred to must be regarded as materially qualified, because it is clear from the decisions in the Privy Council that under certain circumstances and in certain cases the judgment in a previous suit, to which one of the parties in the subsequent suit was not a party, may be admissible in evidence for certain purposes and with certain objects in the subsequent suit.

[*Wood Renton, J.*, referred to the judgment of the

1. *(1884) 11 Cal. 301* at p. *310.*
2. *(1894) 22 Cal. 533.*
3. *(1880) 6 Cal. 171.*
4. *(1898) 25 Cal. 522.*
5. *(1880) 6 Cal. 171.*
6. *(1886) 13 Cal. 352.*

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Privy Council in *Dinomani Chowdrani v. Brogo Mohun Chowdrani* [1].]

That case goes further, and it is there held that Police orders deciding who was in possession of property with all maps and reports attached to such orders are admissible under § 13.

In the case of *Peari Mohun Mukerji v. Drobomozi Dabia* [2], in the course of his judgment, Cunningham, J., said: "Objection has been raised to this judgment that it is not *inter partes* and is therefore inadmissible in evidence. As regards this objection, we think the document is admissible in evidence as showing the nature of the possession of the defendant's predecessor in title. As a rule judgments are evidence only between parties, but there is an exception to this. In the case of *Davies v. Lowndes* [3] it was decided that decrees in Chancery between other parties, concerning the same lands, were admissible in evidence, to show the character in which the possessor enjoyed the lands. That decision is in consonance with the judgment of the Privy Council in the case of *Rameshur Pershad Narain Singh v. Kunjbehari Pathick* [4].

In this particular case, therefore, the previous judgment in D. C. No. 2,092 is admissible as showing the character of the possession at the time and prior to the institution of that action although the admission of a judgment not *inter partes* may appear to conflict with the principle laid down in the maxim "*res inter alios acta alteri nocere debet*" we are concerned with the construction of a special statute and the observations of Douglas Straight, J., when construing the same section of the Indian Evidence Act and in meeting a similar objection, will apply. He said: "It seems to me that the decision (of it) must be looked for in the Evidence Act in

1. *(1901) 29 Cal. 187 at p. 198.*
2. *(1885) 11 Cal. 745.*
3. *1 Bing, N. C. 606.*
4. *(1878) 4 Cal, 633.*

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force in this country and that we really have nothing to do with the principles of the English or of any other law which might apply, if that Act were not in force and binding upon us. We must take that Act as we find it and none the less give effect to it because upon a rational and ordinary construction of its provisions according to well recognized rules of interpreting statutes, they appear to sanction something Courts in England or other systems of law would not permit or to depart from principles adopted by those Courts or the Courts of other Countries. *The Collector of Gorakpur v. Palandhary Singh* [1].

E. W. Jayewardene in reply.

Middleton, J.—This was a partition action which came up in appeal before this Court once before upon the same question, when this Court set aside the judgment of the District Judge allowing to the 14th defendant one-third of the land called Andunuwenne Udumulle, and directed the District Court to adjudicate upon the claim of the parties to Lot 1 in the plan W [3] having regard to the effect of the judgment in action No. 2,092 of the Kalutara Court upon the same.

The question raised on the appeal by the 11th to the 13th defendants, heard by this Court on the 8th May, 1911, was whether the District Judge, Mr. Pieris, was right in awarding one-third of the land in partition to the 14th defendant which share would extend to the Lot 1 in W [3] which the same learned Judge held had been cultivated for 50 years by the 11th to the 13th and the 32nd to the 36th defendants.

There is some doubt in my mind whether the judgment of Mr. Pieris has dealt with all the shares in the land, and

1. *(1889) 12 All. 1 at p. 19.*

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also if the decree on his judgment is not incorrect in not dealing with the 3/24th shares to be allotted to the 15th defendant when he produces DS [1] (see Record p. 131).

The order of this Court of the 8th May, 1911, was intended to enable the Court to adjudicate on the claim of the contesting parties to Lot 1 in W [3] having regard to the effect of the judgment in No. 2,092, Kalutara.

By an arrangement between the parties made at the new trial before Mr. Russell, and recited by him in his judgment, it was agreed that the contest should be confined to the 1/3rd allotted to the 14th defendant in the interlocutory decree. So that the question he had to decide was whether, taking into consideration the effect of the judgment in action No. 2,092, the 11th to the 13th and the 32nd to the 36th defendants had established a title by prescription to the entirety of Lot 1 in W [3] to the exclusion of any share in it by the 14th defendant.

The District Court has decided in favour of the 11th-13th and 32nd-36th defendants-respondents. The 14th defendant appealed.

The decision of the District Judge was clearly affected by the view he took of what the judgment in No. 2,092 proved, and the argument in appeal turned entirely upon whether the judgment in question was admissible under § 13 of the Evidence Ordinance, and if so what was the extent of its probative value.

I think it is impossible now to exclude the statements of the witnesses heard in action No. 2,092, which have been clearly admitted in evidence by the District Court without objection on the part of Counsel appearing for the 14th defendant. Moreover one of these witnesses, *i. e.*, Samsi Lebbe Uduma Lebbe, has been called on the new trial here, and has confirmed the evidence he gave in No. 2,092.

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In the first place I do not think our Evidence Ordinance or the Indian Evidence Act, which is practically the same, ever intended that the principle of *res inter alios acta alteri nocere non debet* should be subverted by any of its provisions.

Taking this hypothesis as a sound basis of argument, it is clear to my mind according to Mr. Ameer Ali that a judgment not admissible in evidence under § 43 could only be admissible under § 13 to prove litigation on the claim made, that is to say, the assertion or denial of the custom or right in question which constitutes a transaction or particular instance within the meaning of § 13. It cannot be used to prove that the litigation was decided in favour of one party rather than the other, nor are its reasons relevant, and it is not to be relied on to show by itself in the subsequent litigation that either of the parties were right or wrong in their assertion or denial of the claim litigated and adjudicated upon. (*Ameer Ali on the Law of Evidence* [1] commenting on the decisions of the Privy Council in *Ram Ragan Chakerbati v. Ram Narain Singh* [2] and *Bitti Kunnar v. Karbo Pershad* [3] referred to in *Tépu Khan v Rajairi Mohun Das* [4] where the rule laid down in *Gugga Lal v. Falleb Lal* [5] was held to be materially qualified by the Privy Council decisions.)

The District Judge states that the judgment of this Court in appeal in No. 2,092 was put in evidence before him, but I am unable to put my hand on it in the record. The only judgment copy of which I find in the record is a copy of the District Court judgment in that action.

In this judgment it appears that 11th, 12th, and 13th defendants in the present action were claiming as defendants against certain parties-plaintiffs (amongst whom was 15th defendant here claiming through Sultan Marikar) that

1. *3rd Edition, pp. 155 & 156.* 3. *(1897) L. R. I. A. 10.*
2. *(1894) I. L. R. 22 Cal. 533.* 4. *I. L. R. 25 Cal. 522.*
5. *(1880) I. L. R. 6 Cal. 171.*

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7 acres or one-half of the land in question in this action belonged really to them by inheritance from one Samsi Lebbe.

In my opinion this is the only transaction or particular instance which the judgment is relevant to prove under § 13 of the Evidence Ordinance.

The 13th defendant in his evidence identifies the land claimed in No. 2,092 as the north-east half of the land now in dispute, and Mr. Pieris further fixes its identity with Lot [1] in W [3].

Eliminating from consideration the remarks of Mr. Russell beginning at page 141 of the Record, "This fresh evidence consists of the proceedings in 2,092 already mentioned" down to the words at page 142 ending "and 14th defendant has not shown why it should not have the same influence over my judgment", I am of opinion that the limited probative effect of the judgment in 2,092 is rather to increase the weight of the reasons given by Mr. Peiris for deciding that the 11th to 13th and the 32nd to the 36th defendants had cultivated Lot [1] for 50 years and that was what they were entitled to under W [3], meaning I must hold that they had obtained a title by prescription and were not mere cultivators. I think therefore that the judgment appealed against must be affirmed and the appeal dismissed with costs.

Wood Renton, J.—I have had the advantage of reading the judgment of my brother Middleton. I entirely agree with it, and I desire only to add a word on the question whether the judgment in case No. 2,092 D. C., Kalutara, although insufficient to establish a plea of *res judicata* as against the appellant, can be relied upon, as the learned District Judge in the present case has relied upon, as evidence against him. After full consideration of the numerous

Indian decisions, including several judgments of the Privy Council, which were cited to us in the argument, I think that this question must be answered in the negative. The authorities are discussed in *Ameer Ali on Evidence*, 4th edition, pages 71 and following, and more briefly in *Caspersz' Modern Estoppel and Res Judicata* 3rd Edition pages 40-42. They appear to me to establish the proposition that while prior judgments not *inter partes* are admissible to show assertion of title and prior litigation relating thereto, such judgments are evidence only of the fact that title was asserted or made the subject of litigation, and not of the correctness of the reasons on which they proceeded.

I agree to the order proposed by my brother Middleton.

Appeal dismissed.

Proctor for appellant—*Joronis Fernando.*

Proctors for respondents—*R. H. Wijemanne* and *D. J. Goonetilleke.*

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KRISTNAPPA CHETTY *v.* CARPEN CHETTY.

No. 21,155, D. C., Kandy.

Present: **Lascelles, C. J. & Wood Renton, J.**

6th May, 1912.

Postdated cheque—Stamp Ordinance—English Law applicable—intent to defraud revenue—penalty for postdating—object of penalty—is penalised contract illegal—bill of exchange—definition—Ordinance No. 22 of 1909 § 64 (a).

A postdated cheque is not invalid.

The effect of the Stamp Ordinance No. 22 of 1909 has been to assimilate the Law of Ceylon as regards postdated cheques to the Law of England.

§ 64 of the Stamp Ordinance of 1909 does not apply to cheques.

To determine whether a document is sufficiently stamped for the

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purpose of deciding upon its admissibility in evidence the document itself must be looked at and not any collateral circumstances.

Ramen Chetty v. Mohammed Ghouse [1] followed.

The imposition of a penalty will not render a contract illegal where the object of the penalty is to deter persons from entering into the contract or to protect the revenue.

Mellis et al. v. Shirley and Freemantle Local Board [2] followed.

The facts of the case appear in the judgment of Lascelles, C. J.

H. A. Jayewardene (with *Balasingham*) for defendant-appellant.—The cheque sued on is invalid. § 64 of the Stamp Ordinance of 1909 penalises the postdating of bills of exchange and promissory notes. The term "bills of exchange" includes "cheques"; vide § 3 (1) of Bills of Exchange Act 1882. Further, a postdated cheque not being payable on demand is really a bill of exchange, and as such is insufficiently stamped according to our Stamp Ordinance of 1909, and is therefore illegal and of no force or avail in law. [*Lascelles, C. J.*—According to the English Act the document does not lose the character of a cheque by reason only of the postdating; vide § 13 (2) of the Bills of Exchange Act 1882.] But the Bill of Exchange Act is subject to our stamp laws. Though the case may be different in English Law, yet under our law postdating cheques is penalised, and this would imply a prohibition. § 18 of the old Stamp Ordinance No. 11 of 1861 is a similar provision to § 64 of the present Ordinance, and under the old section it has been held in the case of *Ceylon Mercantile Bank v. Silva* [3] that the drawer and taker of a postdated cheque commit an illegal act and have no right of action on the instrument. In *Peris v. Fernando* [4] also, following the decision in *Mellis et al. v. The Shirley and Fremantle Local Board* [2] and in *Wills v. Higgins* [5] it was held that where the

1. *(1889) I. L. R. 16 Cal. 433.*
2. *(1885) 16 Q. B. D. 446.*
3. *(1866) Ram. (63-68) 199.*
4. *(1904) 1 Bal. 199.*
5. *(1911) 14 N. L. R. 131.*

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contract which the plaintiff seeks to enforce is expressly or by implication forbidden no Court will lend its assistance to give it effect. Here the penalty attached to the postdating of a cheque implies a prohibition and renders the instrument illegal. [*Lascelles, C. J.*—Under §§ 66 and 67 of the Ordinance in the case of conveyances of land a penalty is attached under certain circumstances; would you say that the conveyances are invalid ?] I would submit so; it would invalidate the transfers. [*Lascelles, C. J.*—That is a startling proposition.] However that is a case where the penalty is attached to the Notary. He is not a party to the contract. [*Lascelles, C. J.*—Is there any authority under the Indian Act ?] There is the case of *Ramen Chetty v. Mohammed Ghouse* [1]. Here the English cases are followed, but in view of our Stamp Act the law stated there would not apply to Ceylon.

Where a man gives a cheque to be presented three months hence he must be held to have intended to defraud the revenue. [*Wood Renton, J.*—It may be the effect, not the intention to defraud.] It is impossible to prove the intention to defraud. The intention must be presumed from the Act. The inevitable result of the act is to defraud the Government of its revenue.

Samerewickrame (with *Cooray*) for plaintiff-respondent.—The decision in *Ramen Chetty v. Ghouse* [1] is in point. § 67 of the Indian Stamp Act is similar to § 64 of our present Stamp Ordinance. In this case it was held that the amount was recoverable in the absence of proof of intention on the part of the plaintiff to defraud the revenue. In the present case there is no such intention proved. The plaintiff was not in funds at the time, and issued a postdated cheque, which was to be kept as security and presented for payment on the stipulated date. The mere fact of postdating does not give rise to the inference of intention to defraud. There has been no direct loss to the Government by the postdating of the

1. *(1889) I. L. R. 16. Cal. 432.*

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cheque. § 64 of the Stamp Ordinance applies only to the documents specifically referred to in it. It applies only to bills of exchange and promissory notes, and not to cheques.

Lascelles, C. J.

The document in question is a cheque, and not a bill of exchange. And a document has to be stamped according to its character as appears on the face of it. (*Bull v. O'Sullivan* [1] and *Gatty v. Fry* [2].) The instrument does not lose the character of a cheque by reason only of its being postdated [Bills of Exchange Act 1882 § 13 (2)]. The effect of § 64 is to penalise, not because the instrument should have been stamped, but because the plaintiff might have executed some other instrument and with intent to defraud the Government executed this instrument instead. With regard to the decision in *Ceylon Mercantile Bank v. Silva* [3], § 18 of Ordinance No. 11 of 1861 is in many respects different from § 64 of the present Ordinance. There is provision there that a postdated cheque should be stamped in a different way upon a graduated scale. There is no such provision in our Ordinance. The authorities do not go so far as to hold that the mere fact that an act is penalised is necessarily a prohibition which would invalidate the contract. *Gye v. Felton* [4].

H. A. Jayewardene in reply.

Lascelles, C. J.—This appeal raises a question of law which is of some public importance, namely, whether since the enactment of the Stamp Ordinance 1909 an action can be maintained to recover money on a postdated cheque.

The defendant on the 15th July, 1911, issued to V. S. S. P. Supramaniam Chetty a cheque for Rs. 4,000. The cheque was dated the 4th August, 1911, and was to be presented for payment on that date. Supramaniam Chetty endorsed the cheque to the plaintiff, who duly presented the cheque at the Kandy branch of the National Bank of India. The cheque having been returned from the Bank on the

1. *(1870) L. R. 6 Q. B. 209.*
2. *(1877) L. R. 2 Ex. D. 265*
3. *(1866) Ram. (63-68) 199.*
4. *(1813) 4 Taunton 876.*

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ground that the endorser's name was illegible and the maker's name was not initialled by the Bank Shroff, the plaintiff now sues to recover from the defendant the amount for which the cheque was given. The defendant among other grounds of defence pleaded that the cheque, being post-dated to the knowledge of the plaintiff, was void and of no avail in law. The learned District Judge has given judgment for the plaintiff.

On appeal the only ground urged before us was that the learned District Judge was wrong in his ruling that an action on a postdated cheque was maintainable. The Law of Ceylon prior to the enactment of the Stamp Ordinance 1909 may be stated as follows :—

By § 2 of Ordinance 5 of 1852 the law to be administered in Ceylon in respect of all contracts and questions arising within the Island upon or relating to bills of exchange, promissory notes, and cheques was the same as would be administered in England in the like case at the corresponding period unless other provision was or should be made by any Ordinance then in force in the Colony or thereafter to be enacted. Prior to the Stamp Act of 1870 the postdating of cheques payable on demand was prohibited by English Law; but this prohibition was removed by the Stamp Act of 1870, and cheques by the law of England are not now invalid by reason only that they are ante-dated (Bills of Exchange Act 1882, § 13 (2).

Turning to the statute law of Ceylon, we find that § 18 of the Stamp Ordinance No. 11 of 1861 imposed penalties on all who issued postdated cheques payable on demand not duly stamped as bills of exchange and on all who knowingly received them and on bankers who cashed them. The application of this section was discussed in *Ceylon Mercantile Bank v. Silva* [1], where it was decided that the holder of a postdated cheque who took it with knowledge that it was postdated could not sue on the cheque.

1. *(1866) Ram. (1863-1868) p. 199.*

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The Stamp Ordinance of 1890 by § 20 (5) re-enacted and amplified the substance of § 18 of the Ordinance of 1861. It is thus clear that under the Stamp Ordinances which preceded the enactment of the Stamp Ordinance 1909 an action was not maintainable on a postdated cheque payable on demand if the holder took the cheque with knowledge that it was postdated.

The question raised by this appeal is whether the Stamp Ordinance 1909 has assimilated the Law of Ceylon as regards the validity of postdated cheques on demand to the Law of England, or whether it has perpetuated the provisions of the earlier Stamp Ordinances under which such cheques are invalid. The material section in the Stamp Ordinance 1909 is § 64 (*a*):—

"Any person who—

(*a*) With intent to defraud the Government of duty, draws, makes, or issues any Bill of Exchange or promissory note bearing a date subsequent to that on which such bill or note is actually drawn or made ; or..........."

On this section four questions were discussed which may be formulated as follows, namely :—

(1) Whether affirmative proof of intent to defraud the Government must be proved ?

(2) Whether, for the purpose of determining whether a cheque is sufficiently stamped, it is permissible to have regard to collateral evidence as well as to the form and terms of the document itself ?

(3) Whether, assuming that proof of an intention to defraud is unnecessary it follows from the fact that the making of the instruments named in § 64 is subjected to a penalty that instruments themselves are invalid ? and

(4) Whether the section has any application to cheques which are not specially referred to in the section ?

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With regard to the first question in the Indian case of *Ramen Chetty v. Mohammed Ghouse* [1], a similar question came before the High Court, and it was there held, under § 67 of the Indian Stamp Act (corresponding to and identical with § 64 of the Ceylon Ordinance) that the section became applicable only when fraudulent intent was proved. This ruling, which is in accordance with the natural construction of the section, would dispose of the present appeal, for there is no proof and no reason to suspect that the cheque now sued on was postdated in order to defraud the Government. This postdated cheque, like most other postdated cheques, was given because the drawer was not in funds at the time. This case is also an authority on the second of the questions which I have formulated. Following the English authorities of *Bull v. O'Sullivan* [2] and *Gatty v. Fry* [3] the High Court held that, in determining whether a document is sufficiently stamped for the purpose of deciding upon its admissibility in evidence, you must look at the document itself as it stands, and not at any collateral circumstances which may be proved in evidence. In other words the test of admissibility is whether the instrument appears, when tendered in evidence, to be sufficiently stamped. This principle is also fatal to the appeal, for the cheque under consideration is in form and terms a cheque on demand, and bears the 5 cent. stamp prescribed for such instruments.

The third question is academic, for my rulings on the two former questions are decisive of the appeal. But as the question involved is one which repeatedly crops up in this Court, it may be well to state the conclusion at which I have arrived. The question involved is whether, when the Legislature imposes a penalty on persons who do a particular act, such act is necessarily to be regarded as unlawful and of no legal effect. There are many English authorities on the subject, but the rule of interpretation laid down by Lord Esher, Master of the Rolls, in *Melliss and another v. The Shirley*

1. I. L. R. 16 Cal. 433. *2. L. R. 6 Q. B. 209.*
3. L. R. 2 Ex. Div. 265.

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and Freemantle Local Board of Health [1], has, I believe, been generally accepted as a correct statement of the result of the cases on the point. "I think," said Lord Esher, "that "this rule of interpretation has been laid down, that, although "a statute contains no express words making void a contract "which it prohibits, yet, when it inflicts a penalty for the "breach of the prohibition, you must consider the whole Act "as well as the particular enactment in question and come to a "decision, either from the context or the subject matter, "whether the penalty is imposed with intent merely to deter "persons from entering into the contract or for the purposes "of revenue or whether it is intended that the contract shall "not be entered into so as to be valid at law."

Applying this test there can be but one answer to the question under consideration, We find in the Stamp Ordinance 1909 several instances where penalties are imposed with the object of deterring persons from doing the prohibited act, but obviously without the intention of branding the prohibited act as illegal. By § 67, for example, a Notary who, in preparing an instrument, omits to set out the consideration is liable to a penalty. But it could not be contended that the effect of this section was to invalidate the instrument. The same intention is obvious in §§ 60, 61 and 62 and in most of the sections in chapter vi. I think it is quite clear on the principle of construction laid down in *Mellis v. The Shirley and Freemantle Local Board of Health* [1] that § 64 does not necessarily invalidate postdated cheques.

The last question is whether § 64 applies at all to cheques. The learned District Judge states that it has been held that cheques are not within the scope of the corresponding section (68) of the Indian Stamp Act. Possibly this statement is based on a note to § 67 in Donogh's "Indian Stamp Law". The authorities there cited do not seem to me to bear out the proposition ; but be this as it may, I think no exception can be taken to the soundness of the statement.

1. *16 Q. B. D. 446.*

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Section 64 of the Ceylon Act and § 68 of the Indian Act refer only to bills of exchange and promissory notes. It is true that the definition of "bill of exchange" in the English Bills of Exchange Act, which definition is incorporated in the Ceylon Ordinance, would include a cheque. But an examination of the Ordinance as a whole removes all doubt on the question. Some sections—§ 49, for example—are intended to apply to all three classes of instruments which fall within the definition of Bills of Exchange, namely, bills of exchange, promissory notes and cheques. In such cases all three instruments are specified. Other sections, such as 51 (1), apply only to bills of exchange and cheques. There these instruments are specified and the case of promissory notes is dealt with in the following sub-section. As a question of construction I am clearly of opinion that § 64 applies only to the instrument specified in the section and that cheques are not within the scope of the section. The language of the Ordinance in this respect is quite consistent. The term "bill of exchange" is, in some cases, used in its generic sense; but where cheques and promissory notes or either of these instruments are particularised, the intention is clear that the term "bill of exchange" is not used in its generic sense, but is intended to denote a bill of exchange in the ordinary acceptation of the term.

The result is that the appeal fails on all of the four grounds raised in the argument. I think there can be no doubt but that the effect of the Stamp Ordinance 1909 has been to assimilate the Law of Ceylon as regards postdated cheques to the Law of England.

The appeal fails and is dismissed with costs.

Wood Renton, J.—The plaintiff-respondent sued the defendant-appellant in this action for the recovery of a sum of Rs. 4,000 on a cheque for that amount by the defendant-appellant in favour of one Supramaniam Chetty, who endorsed it in his favour. The appellant denied the endorsement, alleged want of consideration, and further pleaded that the action was not maintainable, inasmuch as the cheque in

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question was postdated. The learned District Judge decided all these issues in favour of the respondent. The only one that has been pressed upon us in appeal is that the action cannot be maintained because the cheque sued on was postdated. The facts that it was so postdated and that the respondent at the time of its endorsement knew it to be so are not denied by the respondent.

In arguing the point of law just stated on the appellant's behalf, Mr. H. A. Jayewardene relied on § 64 of the Stamp Ordinance of 1909 (No. 22 of 1909), which provides that any person who—

"(*a*) With intent to defraud the Government of duty, draws, makes, or issues any bill of exchange or promissory note bearing a date subsequent to that on which such bill or note is actually drawn or made; or

"(*b*) Knowing that such bill or note has been so postdated, endorses, transfers, presents for acceptance or payment, or accepts, pays, or receives payment of such bill or note, or in any manner negotiates the same......... shall be punishable with a fine which may extend to Rs. 1,000."

Mr, H. A. Jayewardene contended that the effect of this provision was not merely to penalise but to prohibit postdating of cheques; and consequently that a cheque so postdated was illegal, and could not be sued upon in a court of law.

To this argument it seems to me that there are several answers. In the first place, I do not think that § 64 of Ordinance 22 of 1909 applies to cheques at all. Cheques are not referred to in the section; and a very cursory examination of the provisions of the Ordinance is sufficient to show that, while a cheque is itself a form of "bill of exchange" frequently included in the latter term, there are provisions which are restricted to bills of exchange, properly so called and distinguished both from cheques and from promissory notes. § 63,

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for example, which deals with bills of exchange "drawn in sets according to the custom of merchants", is clearly an enactment of that character. Mr. H. A. Jayewardene argued in connection with this branch of his argument that a post-dated cheque is really a bill of exchange, and requires to be stamped as such. The authorities, however, do not, in my opinion, support that contention. (See *Bull v. O'Sullivan* [1]; *Gatty v. Fry* [2]; *Ramen Chetty v. Mohamed Ghouse* [3].)

But even if § 64 of Ordinance 22 of 1909 includes cheques, the offence which it creates can only be established by affirmative proof that the cheque was postdated "with intent to defraud". In the present case any such intent is negatived by the evidence and by the findings of the District Judge; and I do not think that it would be legitimate for a Court to infer fraudulent intention from the mere fact that the person who postdates a cheque may be assumed to know that by so doing he is depriving the Government of revenue.

The last answer to Mr. H. A. Jayewardene's argument, which suggests itself to me, is that, even if § 64 applies to cheques, and proof of express intent to defraud were not necessary, the section merely penalises, and does not render illegal, the postdating of cheques. The law applicable to this question was laid down by the Court of Appeal in England in the case of *Mellis v. Shirley L. B.* [4] as follows :—

"Although a statute contains no express words making "void a contract which it prohibits, yet when it inflicts "a penalty for the breach of the prohibition you must con-"sider the whole Act as well as the particular enactment in "question, and come to a decision, either from the context or "the subject-matter, whether the penalty is imposed with in-"tent merely to deter persons from entering into the contract, "or for the purposes of revenue, or whether it is intended that "the contract shall not be entered into so as to be valid "in law."

1. *(1871) L. R. 6 Q. B. 209.*
2. *(1877) 2 Ex. Div. 265.*
3. *(1889) I. L. R. 16 Cal. 432.*
4. *(1885) 16 Q. B. D. 451.*

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It is clear from this passsage that the question with which we are here concerned is to be answered according to the circumstances of each particular case, and that even where a contract is expressly prohibited the imposition of a penalty does not necessarily involve the consequence that the contract is struck with such illegality that it cannot form a good foundation for an action. *A fortiori*, the imposition of a penalty will not necessarily stamp a contract with illegality, where, as here, the Legislature has not prohibited the act which it has penalised. It must be remembered that the English statute law as to bills of exchange is in force in Ceylon, and that under that law a cheque is not invalid by reason only of the fact that it has been postdated. In view of these circumstances I am unable to hold that the effect of § 64 of Ordinance 22 of 1909 is to prevent a good action from being brought on a postdated cheque.

The decision of Creasy, C. J., and Stewart, J. in *Chartered Mercantile Bank v. Silva & Co.*, [1] 'that a man who receives a postdated cheque with knowledge that it is postdated shall not be allowed to sue on it, turned, I think, on the fact that that was then the law in England. § 18 of the Stamp Ordinance 1861 (No. 11 of 1861) was, it is true, substantially identical with § 64 of Ordinance 22 of 1909. But Creasy, C. J., and Stewart, J., would, in my opinion, have construed the former section differently if the present English Law as to postdated cheques had been in force at the time of their decision.

I would dismiss the appeal with costs.

Appeal dismissed.

Proctor for appellant—*V. M. Saravanamuttu.*

Proctors for respondent—*Beven & Beven.*

1. *(1866) Ram. (1863-68) p. 199.*

ROBERT v. ABEYWARDENE.

No. 10,990, C. R., Galle.

Present: **de Sampayo, J.**

27th June, 1912.

Fidei commissum—prohibition against alienation out of the family—no express designation of person to be benefited—minor—adiation of inheritance.

A prohibition against alienation out of the family of a legatee or donee is itself sufficient to create a *fidei commissum* in favour of the members of the family.

A minor cannot adiate an inheritance, and is not liable to be sued for the debts of the ancestor.

The facts appear fully in the judgment.

Cooray, for appellant.—The clause of the will creates a special kind of *fidei commissum* known to the Roman Dutch Law as a *fidei commissum* left to the family. In such a case a prohibition against alienation out of the family is sufficient. (See *Voet 36. 1. 27; 2 Burge pp. 112 & 113.*) The words "should not sell, etc., to strangers except to the original heirs" clearly indicate such an intention.

A. St. V. Jayewardene, for the respondent.—The clause does not designate clearly who the persons to be benefited are. The Supreme Court has always insisted on a clear designation of such persons. In cases of doubt it is the rule of the law to declare in favour of a free inheritance, and the doubt which the learned Commissioner felt on reading the whole will clearly justifies his view of its construction.

Cooray in reply.

de Sampayo, J.—The plaintiff sues on a mortgage bond dated 31st May, 1910, by which one William Jayesuriya mortgaged to plaintiff a ¼th share of a certain land to secure a sum of Rs. 75 and interest. The defendants are widow and child of the mortgagor. The main question for

Robert v. Abeywardene.

de Sampayo, J.

decision is whether the mortgagor was absolutely entitled to the property mortgaged or whether he had it subject to a *fidei commissum.* The entire property originally belonged to his parents, who by their last will, dated 7th February, 1873, devised it to their children of whom the said William Jayesuriya was one. The will, which by the 12th clause gave the property to the children, contained a condition which according to the translation filed in the case ran as follows:—

> "They (the children) should not sell mortgage or give in rent for a term of more than two years at a time the immoveable property...........to strangers except to the original heirs nor could one or more people outside their circle be granted or obtain any right."

I have had the original will sent for, and the Interpreter Mudaliyar of this Court has certified to the correctness of this translation. The learned Commissioner has held that the will created no *fidei commissum.* He says that there is a clear prohibition against alienation out of the family, but there is no indication of the persons to whom the property in the event of alienaton is to go over. Now, a prohibition against alienation out of the family of a legatee or donee is itself sufficient to create a *fidei commissum* in favour of the members of the family. Illustrations of this kind of *fidei commissum* will be found in *Voet 36. 1. 27* and *Burge pp. 112 & 113.* In *Joseph v. Mulder* [1] the words were :—"The "said grounds shall never be sold or parted with in favour of "a stranger, but shall permanently remain among legal heirs," which the Privy Council construed as creating a *fidei commissum conditionale.* It seems to me that the words in the present will have the same effect, with this difference, that the prohibition, being *personal* and not *real*, extends only to the immediate devisee. (See *Sande on Prohibitions, pt. 3 ch. 2.*) The plaintiffs in *Joseph v. Mulder* [1] did not succeed only because their action was held to be premature, as the prohibition was against a sale only and the action merely

1. *(1903) A. C. 190.*

sought a declaration that the mortgages in question were null and void though the property had not been brought to a judicial sale or even a mortgage action instituted for that purpose. The prohibition in this case is against a mortgage as well; and as the defendants would not be able hereafter to raise the question if a decree for realization of the mortgage by sale of the property were entered, the defendants have rightly raised the question by way of defence. (See also *Silva v. Philipps* [1].) In my opinion the will created a *fidei commissum*, and the mortgage to a person outside the family or, as the will puts it, "outside the circle", is invalid. The plaintiff's action, therefore, cannot be sustained so far as it seeks to realize the mortgaged property.

There is, however, the money claim, which, of course, may be maintainable against a proper representative of the deceased William Jayesuriya. The 2nd defendant is a minor, and is joined as a defendant on the footing of his being an heir; but a minor cannot adiate the inheritance, and is not liable to be sued for the debts of the ancestor. The 1st defendant is widow of the deceased, and there is evidence that she intermeddled with the property of the deceased's estate and so made herself an *executrix de son tort*. Judgment may therefore go against her for the debt due by the deceased. I set aside the decree in this case, and dismiss the action as against the 2nd defendant, but judgment will be entered against the 1st defendant for the money as claimed, to be realized out of the property of the deceased in her hands other than those derived by him under the will of his parents.

As the main question has been as to the validity of the mortgage, the plaintiff will pay the defendant's costs in both Courts.

Set aside.

Proctor for appellant—*E. A. Wijesooriya.*

Proctor for respondents—*A. D. Jayesundere.*

1. *(1908) 11 N. L. R. 154.*

COURT OF APPEAL CASES.

PERERA *v.* PESONAHAMY *et al.*

No. 303, C. R., Gampola.

Present: **de Sampayo, J.**

4th July, 1912.

Court of Requests—action by mortgagors for cancellation of mortgage bond—whether mortgagee bound to claim in reconvention money due—subsequent action by mortgagee—whether barred—res judicata—§§ 207 and 817, Civil Procedure Code.

In an action by a mortgagor to have a mortgage bond cancelled and discharged the mortgagee is not bound to claim in reconvention the money due on the bond, and a subsequent action on the bond is not barred by § 207 or § 817 of the Civil Procedure Code.

A defendant in an action is not bound to claim in reconvention on a distinct and separate cause of action.

An action for the cancellation of a bond can hardly be regarded as an action for a breach of contract within the meaning of § 817 of the Civil Procedure Code.

This was an action for the recovery of money due on a mortgage bond. The defendants contended that the action was barred under §§ 207 and 817 of the Civil Procedure Code, inasmuch as the plaintiff had failed to claim in reconvention the amount due on the bond, in a previous action instituted against him for the cancellation and discharge of the said bond. The previous action was based on the footing that the money due on the bond had been paid, but the plaintiff successfully resisted the plea of payment. The Commissioner of Requests overruled the defendant's contention and entered judgment in favour of the plaintiff. The defendants appealed.

de Zoysa (with *A. St. V. Jayewardene*) for the appellant.—The plaintiff was bound to claim in reconvention in the previous action the amount due on the bond [*de Sampayo, J.* He had invested his money. Why should his hands be forced ?] § 817 of the Code provides that he must do so. [*de Sampayo, J.* That section applies to actions founded upon

a breach of contract.] The previous action was in respect of a breach of contract. We alleged that although the money due had been paid the respondent had failed to cancel and discharge the bond.

Hayley for the respondents.—The previous action was not founded on a breach of contract. (See *Deutsche National Bank v. Paul* [1].)

de Sampayo, J.—The plaintiff brings this action against the defendants on a mortgage bond. The principal question is whether the defendants' plea of *res judicata* is well founded. It appears that in a previous action the defendants as mortgagors sought to have the mortgage bond cancelled and discharged on the ground that the money due on the bond had been paid. The defendant—the plaintiff in this action—took issue on the allegation of payment and succeeded in satisfying the Court that the money had not been paid, with the result that the action was dismissed. It is contended that the plaintiff should, in the previous action, have claimed in reconvention the money due on the bond, and reference is made to §§ 207 and 817 of the Civil Procedure Code. I do not think that either of those sections applies to this matter, and no decision has been cited to me in support of the contention. The defendant in an action is not bound to make a claim in reconvention on a distinct and separate cause of action. Section 207 only applies to the case of a plaintiff who neglects to set up all the claims he may be entitled to on the same cause of action; and I think that the plaintiff in this action is not precluded by that section from realizing his mortgage. As regards § 817 of the Procedure Code, it seems to me that the previous action could hardly be regarded as an action for a breach of contract within the meaning of that section. Some guidance on this point may be obtained from the case of *Deutsche National Bank v. Paul* [1], which was cited to me by Mr. Hayley for the respondent. That

1. (1898) 1 Ch. 283.

was a case under Order xi., rule 1 (*e*) of the English Rules and Orders, by which provision is made for service out of the jurisdiction in actions "founded on any breach of contract", and it was held that an action by a mortgagee for foreclosure of the mortgage and for all necessary accounts and inquiries was not an action "founded on a breach of contract" within the meaning of the rule. I therefore think that the judgment of the learned Commissioner deciding against the defendants on the issue of *res judicata* is right. The appeal is dismissed with costs.

Appeal dismissed.

Proctor for appellant—*T. B. Panabokke.*

Proctors for respondents—*A. V. VanLangenberg.*

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COSTA *v.* LIVERA.

No. 18,621, C. R., Negombo.

Present: **de Sampayo, J.**

29th July, 1912.

Servitude—right of way—substitution of new route by agreement—right to revert to old route—extinguished by abandonment—evidence of abandonment—whether benefit of possession of old route attaches to substituted way—action in respect of old way—if Court finds it cannot be maintained—whether it should be dismissed.

If a person who is entitled to a right of way finally and definitely agrees to accept a new route in lieu of the old route such permanent change would bind him to the extent of disentitling him to use the old route again except by a fresh agreement.

A servitude is extinguished by abandonment or release. Abandonment or release is a question of fact in each case. The mere fact of a new line of way being adopted in lieu of the old route is not in itself proof of abandonment of the servitude along the old way. The length of time during which the new route has been used instead of the old one would be a relevant fact for consideration in connection with the question of abandonment. But if the substitution was made under such

circumstances that the inference of abandonment can be drawn the question of time will not be of much consequence.

Where a right of way has been acquired by prescription and a new route has been substituted by agreement for the old route, the benefit of the old possession would attach to the new route and a prescriptive right can be exercised over the new route.

Where both the old way and the substituted way are obstructed and an action is brought in respect of the old way and the Court finds that the right to use the same can no longer be maintained, the action should not be dismissed, but the plaintiff should be given an opportunity of amending his pleadings and claiming a declaration in respect of the substituted way.

The appellant was entitled, presumably by right of prescriptive possession, to a right of way over the respondent's land along a line marked d............d in the plan filed in the case. About 4 years previous to the institution of this action the parties had substituted by mutual consent a new route, marked a............a in the plan, for the old route. The appellant, alleging that the use of the old way was obstructed by the respondent, brought the present action for a declaration that he be entitled to use the same. According to the plan the point of obstruction complained of was at the junction of the two routes, and it appeared that both the old way and the substituted way were thereby obstructed. At the trial counsel for the respondent urged that the action could not be maintained in respect of the old way as the right to use the same had been extinguished by abandonment. The learned Commissioner of Requests (John Scott, Esq.) upheld his contention and dismissed the plaintiff's action.

The plaintiff appealed.

A. St. V. Jayewardene for the appellant.—The case of *Fernando v. Mendis* [1], on which the judgment of the Commissioner of Requests is based, does not apply, as in the circumstances of that case the owner of the dominant tenement definitely agreed to abandon the same. In the present case a new route has been substituted in lieu of

1. *(1911) 14 N. L. R. 101.*

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the old one, and immediately the new route was obstructed a right to resume the use of the old route accrued to the appellant. (See *Payne v. Shedden* [1].)

E. G. P. Jayetileke for the defendant-respondent.—The case of *Fernando v. Mendis* [2] is indistinguishable. The facts show that the old route had not been used for over 4 years; it is submitted that this is a clear indication of abandonment. The case of *Payne v. Shedden* [1] is no authority for the proposition that the owner of the dominant tenement may revert to the use of the old route in case the substituted way is obstructed. The appellant has misconceived his remedy in this case. He should have instituted an action in respect of the substituted way. [*de Sampayo, J.* What right would he have to do so?] It is submitted that where, as presumably in this case, the original way has been acquired by prescription the benefit of the old possession would attach to the new route, and the appellant can therefore exercise a prescriptive right over the new route. The case of *Payne v. Shedden* [1] and *Voet 8. 3. 8.* support this view.

A. St. V. Jayewardene in reply.

c. a. v.

de Sampayo, J.—The plaintiff brings this action for obstruction of a right of way which he claimed over the defendant's land. The way claimed is along the line marked d............d in the plan filed in the case. That plaintiff has a right of way is not denied; but the defendant disputes the plaintiff's present claim to use the route d..............d for the reason that the parties had by mutual consent substituted a new route, marked a............a in the plan, for the old route d............d. The contention for the defendant is that the plaintiff has lost the servitude of way over the line d............d by abandonment or release. That a servitude is extinguished by abandonment is of course indisputable. In *Fernando v. Mendis* [2], which is relied on, the servitude was a right to draw water

1. *1 M. & Rob. 382.* 2. *(1911) 14 N. L. R. 101.*

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from a particular well; but that decision is no authority for the present contention. Abandonment or release is a question of fact in each case; and the point in this case is whether the mere fact of a new line of way being adopted in lieu of the old line is proof of abandonment of the servitude of way over the defendant's land along the old line. Without more evidence I cannot say it is. There was no evidence gone into at the trial; but the Court decided the case more or less as an abstract question of law on the mere admission "that plaintiff by agreement used the line a...........a instead "of d... ....d". As regards the law, as I have said, the decision I have above referred to does not quite apply. There is not much direct authority that I can discover applicable to the point. *Voet 8. 3. 8.* says that the owner of the servient tenement may by election or agreement alter the route, provided the change does not prejudice the owner of the dominant tenement. See also *Maasdorp's Inst. 183.* But it is not clear whether the owner of the dominant tenement may revert to the use of the old route or whether the servitude must in the case of a change be confined to the new route. I should say that, if the owner of the dominant tenement has finally and definitely agreed to the new route in lieu of the old route, such permanent change would bind him to the extent of disentitling him to use the old route again except by a fresh agreement. The matter may be complicated with us by reason of such agreements affecting land being required to be in writing notarially attested, and possibly it was the perception of this difficulty that induced the plaintiff to claim the old route in this case. Mr. Jayetileke, for the defendant, made the acute suggestion that where, as presumably in this case, the servitude was acquired by prescription, the benefit of the old possession would attach to the new route, and he argued that the plaintiff could now exercise his prescriptive right over the new route. I think this argument is sound, because after all the essence of the servitude is the right of way over the servient tenement and the particular route affects only the manner of its exercise. What is prescribed for by long user is not the ground over

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which the way lies but the incorporeal right of servitude. This is not inconsistent with, but is in a sense supported by, the decision in *Payne v. Shedden* [1], which was cited by Mr. A. St. V. Jayewardene for the plaintiff. There the action was for trespass *quare clausum fregit*, and the defendant justified by pleading a right of way over the plaintiff's land by user for 20 years. It appeared that the line of the way had been a good deal varied during the 20 years, and at certain periods wholly suspended, by agreement between the parties; and it was contended that a user with such variations and suspensions did not support the existence of a servitude or easement at all. The Court held first that a suspension of enjoyment by agreement would not extinguish the *right*, and secondly that the user of a substituted line would be an exercise of the *right* and evidence of its continued enjoyment; that is to say, that the right of easement by whatever route remained unextinguished, and was a good answer to the action for trespass. That case did not decide, and was not intended to decide, as to what route the defendant was entitled or was bound to use. In my opinion this case cannot be decided on a mere abstract question of law, but can only be determined on evidence. If the plaintiff definitely abandoned the route d............d, I think that he must now be restricted to the new route a.........a. For the reasons I have indicated the Ordinance 7 of 1840 will not be in the way of such restriction, even if the user of the new line a............a has not been long enough to give plaintiff a new right by prescription. The length of time during which the new route has been used instead of the old one would however be a relevant fact for consideration in connection with the question of abandonment. But if the substitution was made under such circumstances that the inference of abandonment can be drawn, the question of time will not be of much consequence: *Regina v. Chorley* [2]. If upon the evidence the Court finds that the right to use the route d............d can no longer be maintained, but that the plaintiff's right is to use the route a............a, it does not follow

1, *1 M. & Rob. 382.* 2. *12 Q. B. 515.*

that the plaintiff's action must necessarily be dismissed. The point of obstruction complained of is at the junction of the two routes, and the plaintiff has a cause of action whichever line of way he may ultimately be found entitled to use. It is true that in the plaint he asserted his right to use the route d............d, but it would be convenient and save both parties further expense if the dispute be determined once for all in this action. The action may therefore proceed upon the footing that the defendant is sued for an infringement of the plaintiff's right of servitude by putting up an obstruction at the point indicated in the plan, whether the route up to the point of obstruction is along the line d............d or along the line a............a. This may be done after amendment of the pleadings, if necessary, and upon proper issues to be framed, and subject to such order as to costs consequent on such amendment as the court may think fit to make.

The judgment appealed against is set aside and the case is sent back to be proceeded with as above indicated. The costs of the last trial and of this appeal will abide the final result.

Set aside and sent back.

Proctors for appellant—*de Silva and Perera.*

Proctors for respondent—*de Zoysa and Perera.*

JAYASHAMY *et al.* v. ABEYSURIYA.

No. 1,178, D. C., Tangalle.

Present : **Lascelles, C. J. & de Sampayo, J.**

9th August, 1912.

Deed of gift from father—in favour of adulterine bastard—whether valid.

Adulterine bastards can take under a gift or bequest from the father.

Rabot v. Silva [1] and *Wickremenayake v. Perera* [2] followed.

This is an appeal from a judgment of the District Judge of Tangalle (Allan Beven, Esq.). The facts appear in the judgment of de Sampayo, J.

Bawa, K. C. (with *Canekeratne*) for the the appellant.—A gift to a bastard is prohibited under the Roman-Dutch Law. [*de Sampayo, J.* The judgment of the Privy Council in *Rabot v. de Silva* [1] is against you on this point.] It does not follow from that judgment that the prohibition of the Roman-Dutch Law is abolished.

Adulterine children do not become legitimate by the subsequent marriage of the parents. The intention of the legislature was to place a heavy sanction on adultery and to deter people from living in adultery out of some feeling for the offspring.

H. A. Jayewardene (with *Samerewickrame*) for the respondents.—Under the Roman-Dutch Law the prohibition extended both to the property of the father and the mother. It has been held in the case of *Wickremenayake v. Perera* [2] that an adulterine bastard had the right to succeed to the mother by inheritance. That principle would apply to this case. If a person can inherit, he can take by donation.

Bawa, K. C., in reply.—The case cited does not apply. It is a case of inheritance from the mother, and comes under

1. (1909) 12 N. L. R. 81. 2. (1908) 11 N. L. R. 171.

Jayashamy *et al.* v. Abeysuriya.

an express legal enactment (see § 37 of Ordinance No. 15 of 1876). [*de Sampayo, J.* That case was not decided under the Ordinance, as the marriage was before the Ordinance.]

c. a. v.

Lascelles, C. J. & de Sampayo, J.

Lascelles, C. J.—I entirely concur in the judgment of my brother Sampayo, which I have had the opportunity of reading. The present case is in principle covered by authority.

In *Wickremenayake et al. v. Perera* [1] this Court held that the rule of Roman-Dutch Law which prohibited adulterine bastards from inheriting from their mother was the logical result of the fact that, under Roman-Dutch Law, the union between their parents was prohibited and was a punishable offence. Now that such unions are no longer prohibited or punishable, the Court held that the incapacity t inherit no longer attaches to the offspring. The principle of this decision is applicable to the present case, for it is inconceivable that the status of adulterine bastards should be such that they can lawfully succeed *ab intestato*, but that when it comes, to taking by gift from a parent the incapacity imposed by the Roman-Dutch Law is still in force. But I understand that in *Rabot et al. v. de Silva* [2] the Privy Council took the view that the Roman-Dutch Law with regard to the consequences of adultery has in effect been repealed by the legislation which is now embodied in the Marriage Registration Ordinance No. I9 of 1907.

I agree that the appeal should be dismissed with costs.

de Sampayo, J.—The 2nd, 3rd, and 4th plaintiffs are the children of the Ist plaintiff, born to her out of an adulterous connection with one Suwaris de Silva now deceased.

1. (1908) 11 N. L. R. 71. 2. (1909) 12 N. L. R. 81.

Jayashamy *et al.* v. Abeysuriya.

de Sampayo, J.

The defendant is the administrator of the estate of Suwaris de Silva, and this action is brought to recover a sum of Rs. 1,500 gifted by Suwaris de Silva to the 2nd, 3rd, and 4th plaintiffs to be paid out of his estate after his death. The defence is that, as the children are adulterine bastards, the gift is invalid under the Roman-Dutch Law, which it is argued is still in operation in Ceylon on this point. The well known decisions on the question of gifts to persons who have lived in adultery and to the children of such unions were cited to us. The effect of these decisions is to set at rest the question as regards the validity of a marriage between persons who have lived in adultery and of a gift between such persons under the law now prevailing in Ceylon. I need only refer to the Privy Council decision in *Rabot v. Silva* [1]. But it is argued that the children of such unions are still under the disability imposed by the Roman-Dutch Law. This would be a curious result, if well founded, because it would be to punish, as it were, victims of persons whose misconduct the law condones. In my opinon the law is not so unreasonable. All the disabilities in question under the Roman-Dutch Law, including those of adulterine bastards, are a consequence of the policy which regarded adultery as a crime and marriage between adulterous persons as invalid, and as that policy is found no longer to exist in Ceylon, all the consequences thereof have also disappeared with it. This, I think, is the true significance of the decision of the Privy Council. This certainly was the view taken by this Court in *Wickremenayake v. Perera* [2], which, I think, covers the point now raised. But it is contended that that decision does not apply, because there the question was as to the right of the children to succeed to the mother by inheritance. The *ratio decidendi* of that case, however, is much wider than contended for, and the decision, in which I venture to say I entirely concur, is an authority for the proposition that adulterine bastards can now take under a gift or bequest

1. (1909) 12 N. L. R. 81. 2. (1908) 11 N. L. R. 171.

from the father. I think the judgment of the District Judge in this case is quite right, and I would dismiss the appeal with costs.

Appeal dismissed.

Proctor for appellant—*D. E. Wijesuriya.*

Proctor for respondents—*V. S. Wickramanayake.*

———: o :———

DHARMASENA *v.* SUDUMAMA *et al.*

No. 15,155, C. R., Chilaw.

Present : **Lascelles, C. J.**

5th September, 1912.

Decisory oath—duty of officer administering oath—failure to take and record evidence contemporaneously—fatal irregularity—Ordinance 9 of 1895 § 9 sub-sec. 2.

The failure on the part of the officer administering an oath to take and record contemporaneously the evidence of the persons sworn or affirmed is an irregularity which is fatal to the proceedings.

In this action the plaintiff sued the defendants for recovery of damages consequent on the destruction by the defendants and the appropriation of the materials of a wire fence erected by the plaintiff. The defendants, among other averments denied that plaintiff was the owner of the fence. At the trial on the 3rd July, 1912, the plaintiff offered to be bound by the following oath to be taken by the 4th defendant before the altar of the Church at Bandirrippuwa, viz.: that the fence in question did not belong to the plaintiff, and he consented to have his action dismissed if this oath was duly taken. The Court Interpreter was the officer deputed by the Commissioner to administer the oath. He failed to take a record of the evidence of the person making the oath at the time, bnt on the 5th July he was examined in Court and stated as follows :—"I am Interpreter of the C. R., Marawila, and Chilaw. I administered the oath on the parties in this

Dharmasena v. Sudumama *et al.*

"case. The 4th defendant, M. Aratchigey Jusey, swore that "when he pulled out the 28 fathoms barbed wire that fence did "not belong to the plaintiff. He took oath at Bandirrippuwa "Church". The Commissioner of Requests thereupon dismissed plaintiff's action with costs. The plaintiff appealed.

R. L. Pereira for the plaintiff-appellant.—Section 9 sub-section 2 of Ordinance 9 of 1895 makes it imperative that an officer depnted to administer the oath by any Court should take a record in writing of the very words sworn to by the party taking the oath. This was not done in this case, but the officer was only examined in Court as to what transpired at the taking of the oath. This is not a sufficient compliance with the requirements of the Ordinance.

Samarawickreme for the defendants-respondents.—It is not absolutely necessary for the officer administering the oath to take a note of the very words of the oath taken at the time. It has been held by the Full Court in the case of *Mohamadu v. Kadiravel Kangany* [1] that the report of the officer deputed to administer the oath, stating that the oath was duly administered in terms of the order of the Court, was a sufficient compliance with the requirements of the Ordinance. It was held not to be necessary to give the very words of the oath.

R. L. Pereira in reply.—This case is not on all fours with the case just referred to. There it was held that the report of the officer was evidence in writing taken at the time indicative of the oath having been duly taken. Here the officer being examined at a later date is speaking from memory of what transpired. Even in the Full Court case referred to, Wood Renton, J., dissented and stated that it was imperative and obligatory on the part of the officer to record the very words of the oath taken.

1. *(1908) 11 N. L. R. 278.*

Dharmasena v. Sudumama *et al.*

Lascelles, C. J.

Lascelles, C. J.—This is a case in which the claim in the action was for damages for injury to a fence. The entry in the journal under date the 3rd July is as follows:—"Case "settled—4th defendant to swear that the portion of fence "28 fathoms referred to did not belong to the plaintiff at "time of removal. To take oath at Bandirrippuwa Church "tomorrow at 5-30 p. m." It appears that on the following day, that is on the 4th, the oath was taken by the 4th defendant; and on the 5th, the next day, the interpreter appeared in Court and was examined on oath *ex parte;* and he deposed that he administered the oath to the parties in this case, and that the 4th defendant had sworn that, when he pulled up the 28 fathoms of barbed wire, the fence did not belong to the plaintiff; and he also deposed that he, that is the 4th defendant, took the oath at Bandirrippuwa Church.

The substantial objection to the procedure is that sub-section (2) of section 9 of the Oaths Ordinance 1895 has not been complied with. The section, dealing with decisory oaths, provides that the Court may authorise any person to administer the oath and to take and record in writing the evidence of the person to be sworn or affirmed and return it to the Court. Now, there is no doubt but that in this case the procedure prescribed by the section has not been complied with; and the only question that I have to consider is whether the failure of the interpreter to take and record the evidence of the persons sworn or affirmed is a fatal irregularity. In my opinion the irregularity is fatal to the proceedings. The case here is a much stronger one than the case of *Mohamadu v. Kadiravel Kangany* [1], because there was no contemporaneous report of the evidence made at all. All that happened was that the interpreter appeared in Court the day after he had administered the oath and recorded the substance of the evidence in a very perfunctory manner. I think it would be straining the language of the Ordinance unduly to allow this procedure as a compliance with the Ordinance. The objection of the procedure is to have a distinct,

1. *(1908) 11 N. L. R. 278.*

Dharmasena v. Sudumama *et al.*

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complete, and intelligible record of the evidence given under the Ordinance. If the person charged to administer the oath is allowed at a later stage to appear in the Court and give evidence *ex parte* from his recollection of what was said on oath, it is obvious that the intention of the Ordinance will not have been carried out. The loose way in which the statement on oath has been reported has left room for the statement in the petition of appeal that as a matter of fact the oath was not taken in the Church at all, but in the compound of the Church, and the language reported to have been used by the 4th defendant seems to me to point to the fact that he gave his evidence in a very guarded and reserved way. I am by no means satisfied that justice has been done in this case apart from any technical question. I would set aside the judgment in the case and direct the case to be tried in the ordinary course. The appellant is entitled to the costs of the appeal.

Case remitted.

Proctors for appellant—*Martin & Sansoni.*

Proctor for respondent—*G. V. E. Perera.*

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF DON MATHES DE SILVA, DECEASED.

RANATUNGA—*Executor-Appellant.*

No. 486, D. C., Tangalle.

Present: **Lascelles, C. J. & de Sampayo, J.**

11th July, 1912.

Stamps—probate or administration duty—whether value of estate is value at death of deceased or at date of filing final account.

The value of an estate for the purpose of ascertaining probate or administration duty is its value at the death of the deceased, and not at the date of filing of the final account.

This is an appeal from an order of the District Judge of Tangalle directing the executor to pay stamp duty on the probate according to the value of the estate at the date of filing of the final account.

Bartholomeusz for the appellant.—The value of the estate for the purpose of the testamentary proceedings is the value at the death of the deceased. The Commissioner of Stamps is of that opinion. The case of *In re William Perera* [1] refers to an under-valuation of the estate, and is not applicable to the present case.

Lascelles, C. J.—This appeal raises a question whether the value of an estate for the purpose of ascertaining probate or administration duty is to be taken to be the value of the estate at the death of the deceased, or of the value of the estate at the date of filing of the final account. The matter was referred in this case to the Commissioner of Stamps for his opinion ; but I should have thought that, on general principles, the question was one on which no doubt could possibly arise. The opinion of the Commissioner of Stamps was that the property ought to be valued as at the day of the death, and that income subsequently accruing is not to be taken into account. In my opinion there can be no doubt

1, 1 Bal. 70.

In re Last Will and Testament of Don Mathes de Silva.

de Sampayo, J.

that this opinion is correct. Probate and administration duties are taxes which are levied on the devolution of property at the death of the owner, and it is essential that the value of the property should be ascertained as from the date of the death. There appears to have been some confusion with regard to the reference to the District Court of Colombo. The letter of the Secretary of the District Court of Tangalle is unintelligibly expressed, and it was evidently understood, and I think naturally so, to inquire as to the time at which the assessment of the value of the estate was to be made, and not whether the value of the estate was to be ascertained as from the date of the death or as from the date of the filing of the final account. It is clear from the answer of the Secretary of the District Court of Colombo that he understood the inquiry to relate to the time at which the valuation of the estate was to be made. There is only one other point that requires notice, and that is the observation of the learned District Judge that the appellant's application under § 69 was out of time. Taking the date endorsed on the probate as being the date when the true value of the estate was ascertained, namely, the 6th of September, 1911, it is clear that the application is not out of time. The opinion in my judgment refers only to the valuation of the estate for the purpose of ascertaining its value for probate or administration duty, and has no reference to any Court fees which may be chargeable under the proceedings. In my opinion the appeal ought to be allowed, and the District Judge should act in conformity with the opinion which I have expressed. The appellant to have the costs of the appeal paid out of the estate.

de Sampayo, J.—I agree, and would only add that the difference in the so-called valuation is due not to any undervaluation on the part of the appellant in the inventory, but to an addition of the income of the estate which subsequently accrued up to the date of filing of the final account. I think, in regard to the stamps on letters of probate, it is the property of the estate at the death of the deceased that should be taken into account, and not the subsequent income of that property. I wish also to say that the learned

District Judge appears to have misconstrued or misread the judgment of Layard, C. J., reported in *1 Balasingham 70* which he refers to in his order. It is very clear, on the proper reading of that judgment, that the Chief Justice did not differ from the opinion expressed by us in this case, but that he decided that the executor in that case had under-valued the estate originally, because from her own final account it appeared that the value shown in that account was the proper value of the estate.

Appeal allowed.

Proctor for appellant —*L. G. Poulier.*

———:o:———

WICKREMESINGHE *v.* PUNCHI NONA.

No. 5,246, D. C., Matara.

Present: **Pereira & Ennis, JJ.**

20th September, 1912.

Mortgage of several lands—right of mortgagee to sell in any order—absence of special directions in the decree—Civil Procedure Code § 201.

In the absence of a special direction by the Judge, it is quite open to the mortgagee-creditor to exercise his own discretion as to the order in which the lands shall be sold.

The mere fact that the lands are scheduled in the decree in a certain order is not tantamount to a direction to sell them in that order.

This was an action on a mortgage bond. Decree was duly entered in favour of the plaintiff; but there were no directions therein as to the order in which the mortgaged properties should be sold in default of payment of the mortgage debt. The mortgagor, however, made default, and the mortgagee claimed the right to sell the mortgaged properties in any order he thought best to secure to himself the amount of his decree. The District Judge held that they should be sold in the order in which they appeared in the schedule annexed to the decree. Against this order the mortgagee appealed.

Wickremesinghe. v. Punchi Nona.

Pereira, J.

Samerewickrame (with *Cooray*) for the plaintiff-appellant.—A mortgagee has the right to sell the mortgaged properties in any order he pleases see *2 Maasdorp 299; Voet 20. 5. 4; 1 Ceylon Law Review 28.*

A. St. V. Jayewardene for the respondent.—The Judge has impliedly indicated that the properties should be sold in the order in which they appear in the schedule. This is a question of procedure which is governed by the provisions of § 201 of the Civil Procedure Code, and therefore the authorities cited have no application.

Samerewickrame in reply.

Pereira, J.—I do not think that this decree can stand. It is said by the Counsel for the respondent that the decree in the case is a decree under section 201 of the Civil Procedure Code. Assuming that to be so, it was open to the District Judge to give directions as to any particular order in which he desired the different parcels of land to be sold. Such directions were not given. It is argued that the fact that the lands are scheduled in a certain order is tantamount to a direction to sell them in that order. I cannot accede to that contention. The lands had to be shown in the decree in *some* order. and I should have expected something more than the fact that they appear in the decree in a particular order to indicate that they were to be sold also in that order. In the absence of a special direction by the Judge it is, in my opinion, quite open to the mortgagee-creditor to exercise his own discretion as to the order in which the lands should be sold. It may be that the title to some lands is uncertain, and there may be other objections, to the sale of these lands, and it would be unfair to the creditor that he should be compelled to effect sales that may, in his belief, turn out to be perfectly nugatory. The creditor must be allowed to recover his money in the least expensive way possible. The authorities cited by the Counsel for the appellant from *2 Maasdorp p. 299 and Voet 20. 5. 4.* appear to be in point. I think that the appellant is entitled to succeed, and the appeal is allowed with costs.

Ennis, J.—I agree. In the absence of any special direction in the decree the creditor would be entitled to make his choice in any order that he thinks best to secure him the amount of his decree.

Appeal allowed.

Proctor for appellant—*G. E. & G. P. Keuneman.*

Proctor for respondent—*E. Buultjens.*

———:o:———

FONSEKA *v.* NARAYANEN CHETTY.

No. 8,256, D. C., Negombo.

Present: **Lascelles, C. J. & de Sampayo, J,**

22nd May, 1912.

Evidence Ordinance § 92—notarial mortgage bond—subsequent written agreement—to change mode of payment and to increase burden of debt—whether admissible in evidence and enforceable in any respect—interest affecting land.

A subsequent non-notarial written agreement, which not only changes the mode of payment of a debt but increases its burden, is inadmissible in evidence for the purpose of varying any prior notarial mortgage bond. It constitutes one entire promise which is partly within and partly without § 2 of Ordinance 7 of 1840, and therefore is not enforceable in any respect.

Such an agreement makes the security bear a larger debt, and consequently does affect the lands or immoveable property mortgaged.

Kiribanda v. Ukkubanda [1] and *Lushington v. Carolis* [2] distinguished.

Bawa, K. C. (with *R. H. Morgan*) for the appellant.

Samerewickrame (with *H. A. Jayawardene & E. G. P. Jayetileke*) for the respondent.

c. a. v.

1. *(1911) 14 N. L. R. 181.* 2. *(1911) 14 N. L. R. 189.*

Fonseka v. Narayanen Chetty.

de Sampayo, J.

de Sampayo, J.—On 7th December, 1903, the plaintiff and his wife executed a mortgage bond whereby they bound themselves jointly and severally to pay to the defendant and three other chetties or to one or more of them on demand a sum of Rs. 1,500 with interest thereon at 13 per cent. once every four months and in default thereof to pay interest at the rate of 20 per cent., and as security for such payment they mortgaged certain immoveable property. The plaintiff from time to time made certain payments in liquidation of the debt, and he says that at the date of this action there was due on the bond only a sum of Rs. 285, which was tendered to defendant, but was not accepted. He accordingly brought this sum into Court and prayed that the mortgage bond be cancelled and returned to him. But the defendant pleaded that by a subsequent written agreement the terms of payment were varied, and that on the footing of that agreement the balance due on the bond was Rs. 1,177·50, and he accordingly claimed this sum in reconvention and prayed for a mortgage decree and for sale of the mortgaged property.

It appears that on the 7th April, 1906, the plaintiff and the chetties came to a new agreement as to the payment of the amount of the debt. They made a calculation of the interest that would be due on the principal sum of Rs. 1,500 from that date till the 6th June, 1910, at 12 per cent., and adding the same to the principal they arrived at the total sum of Rs. 2,250. It was then agreed that this sum should be paid by 25 instalments of Rs. 90 each payable bi-monthly, that after all the instalments have been fully paid the mortgage bond should be cancelled and discharged, and that in default of payment of the instalments as agreed interest should be payable on any unpaid balance at the rate of 20 per cent. as from the 7th April, 1906. This agreement was subsequently embodied in a writing, dated the 13th October, 1907.

The point for consideration is, whether the writing, which is non-notarial, is admissible in evidence and is available for the purpose of defendant's claim in reconvention.

Fonseka v. Narayanen Chetty.

de Sampayo, J.

It will be noticed that the document itself is not declared upon as an independent agreement but is sought to be engrafted on the original mortgage bond, and that the defendant's claim is on the mortgage bond as so modified. The District Judge has admitted the document in evidence on the authority of *Kiribanda v. Ukkubanda* [1]. That case decided that since the enactment of the Evidence Ordinance a notarial agreement might be varied by a subsequent non-notarial writing, provided that the latter writing was not itself of such a nature as to require notarial execution under Ordinance 7 of 1840. The document in that case was a receipt for interest, which also contained an agreement that no further interest should be payable on the mortgage bond, and was held to be admissible so as to relieve the debtor from its date of his obligation to pay interest. The reason for its admissibility, notwithstanding the Ordinance 7 of 1840, was thus put by Lascelles, C. J.: "It was not given for establishing any security interest or incumbrance affecting "land"; and Middleton, J, said : "It does not modify the original agreement in any respect as regards its effect on land "or immoveable property". Herein lies, to my mind, the distinction between that case and this. The writing in question not only changes the mode of payment of the debt but increases its burden, with the result that now the plaintiff owes Rs. 1,177·50 instead of a smaller sum. The further effect of this is to make the security bear a larger debt, and consequently I think the agreement does effect the lands or immoveable property mortgaged by plaintiff. The defendant himself understood the agreement in this sense, because, as I said before, he declared upon the mortgage bond as modified by the subsequent writing, and not on the writing itself, and I think myself this is the effect of the writing which stipulated that the plaintiff was not to be entitled to redeem the mortgage until he had paid all the instalments under the agreement. The District Judge himself felt this difficulty, since he refused to give defendant a mortgage

1. *(1911) 14 N. L. R. 181.*

Fonseka v. Narayanen Chetty.

de Sampayo, J.

decree. If the case of *Kiribanda v. Ukkubanda* [1] relied on applied, I do not see why the defendant should not have a mortgage decree as well. In dealing with the difficulty the District Judge referred to the case of *Lushington v. Carolis* [2], which was relied on before us also, and held that in the writing the promise to pay the money on the terms agreed was separable from the agreement relating to the mortgage, and that before the writing could and did modify the personal obligation on the bond though not the mortgage security. Now, the above case is quite different from this. There the action was for a non-notarial bond, which was of itself a single and complete document, and was not one modifying any prior notarial mortgage bond. This Court held, and, if I may say so, rightly held, that the document could be sued on so far only as the personal obligation was concerned. Moreover, I do not think that the present writing can be split up in the same way. It constitutes one entire promise, which is partly within and partly without § 2 of Ordinance 7 of 1840, and therefore according to that very decision is not enforceable in any respect.

In my opinion the judgment appealed against cannot be sustained. I think it should be set aside and the case sent back for ascertainment of the amount now due from the plaintiff on the basis of the original bond. It is desirable that the parties should, if possible, agree as to the amount; but otherwise the District Judge will ascertain the amount by further inquiry, and on payment by plaintiff of the amount so agreed or ascertained judgment should be entered for plaintiff in terms of the second prayer of the plaint. The plaintiff will have costs of this appeal. But as regards the costs of the District Court, the plaintiff's denial of the execution of the writing necessitated a long trial on the issue of fact, and I think each party should bear his own costs in the District Court. The costs of the further pro-

1. (1911) 14 N. L. R. 181. 2. (1911) 14 N. L. R. 189.

ceedings, if any, will be at the discretion of the District Judge.

Lascelles, C. J.—I entirely agree.

Set aside.

Proctor for appellant—*C. J. Edirisinghe.*

Proctor for respondent—*D. L. E. Amerasinghe.*

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VELUPPILLAI *v.* CASIPPILLAI.

No. 6,705, P. C., Jaffna.

Present: **Wood Renton, J.**

22nd July, 1912.

Frivolous or vexatious complaint—order for compensation—all the witnesses of complainant not examined—§ 197 (1) Criminal Procedure Code.

There is nothing in § 197(*1*) Criminal Procedure Code which either expressly or by necessary implication requires a Police Magistrate to hear every witness whom a complainant may desire to call before exercising the powers with which the section has invested him.

A charge that is deliberately false is "vexatious" within the meaning of § 197.

The appellant in this case charged the accused with having voluntarily caused hurt to him under § 314 of the Penal Code. He gave the names of four persons as witnesses, and on the date of trial they were all present in Court. But after hearing the complainant and one of his witnesses the learned Magistrate acquitted the accused and called upon the complainant to show cause why he should not be fined Rs. 5 crown costs and Rs. 10 compensation for having brought a false charge against the accused. On no cause being shown he was fined Rs. 5 crown costs and ordered to pay Rs. 10 compensation to the accused. The complainant appealed against the order to pay compensation.

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J. Joseph for the appellant.—The order to pay compensation was irregular. The complainant's case was not closed, and the learned Magistrate should have allowed the complainant to call all his witnesses. (*Suppa Nayakka v. Kawua* [1], and *483 P. C., Kurunegalle, 10,764* [2]. The complaint is not vexatious. A vexatious complaint is one that is brought without cause, or for a matter so trivial that no person of ordinary temper would complain of it, with intent to harm the person complained of. *de Silva v. Mohammado* [3]. Here the charge against the accused is one of voluntarily causing hurt, and it cannot be said to be a trivial offence.

Wood Renton, J.—This is an appeal against a conviction under § 197 of the Criminal Procedure Code. The appellant charged one Nannitamby Casipillai with having voluntarily caused hurt to him, an offence punishable under § 314 of the Penal Code. The appellant himself gave evidence, and at the close of his evidence called another witness, who was duly examined. The learned Police Magistrate regarded the evidence of both the appellant and this witness as entirely false. He convicted the witness under § 440 of the Criminal Procedure Code of having given false evidence and fined him Rs. 50, sentencing him in default of payment of the fine to one month's rigorous imprisonment. The learned Magistrate then called upon the appellant to show cause why he should not be fined Rs. 5 crown costs and Rs. 10 compensation for having brought a false charge against the accused. The appellant apparently had no special cause to show, and he was forthwith fined Rs. 5 and ordered to pay Rs. 10 compensation. There is no appeal from the fine of Rs. 5 by way of crown costs. But the present appeal is brought against the order to pay compensation. The main point urged on the appellant's behalf is that the Police Magistrate had no right to make the order under appeal inasmuch as the appellant had several other witnesses whose names were on his list of witnesses, and

1. *(1899) 2 Tamb. 110.* 2. *(1899) Koch 54.*
3. *(1897) 3 N. L. R. 3.*

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Wood enton, J,

who were not in fact examined. I do not see anything in the record to show that an application was made to the Police Magistrate on the appellant's behalf for leave to call the additional witnesses. But I will decide the case on the basis that such an application had been made and had been refused. The procedure is defined by § 197 of the Criminal Procedure Code. There is nothing in that section which either expressly or by necessary implication requires a Police Magistrate to hear every witness whom a complainant may desire to call before exercising the powers with which the section has invested him. There are, however, two reported cases in which it was held by Lawrie, J., that an order as to crown costs and compensation is bad if made without examining all the witnesses that the complainant undertakes to produce. (See *Suppa Nayakka v. Kawwa* [1], and *483 P. C., Kurunegala, No. 10,764* [2].) With the utmost respect I am unable to follow those decisions in view of the language of § 197 of the Criminal Procedure Code itself. They appear to me to amount, not to a judicial interpretation of that section, but to its amendment by a species of legislation which the law of the Colony does not recognise. It is quite easy to put cases in which the application of the rule laid down by Lawrie, J., in the two decisions above referred to would yield absurd results. Suppose that a complainant filed a list of 10 or 15 witnesses, that the complainant himself and 3 or 4 of his witnesses broke completely down in the course of cross-examination, and that it was obvious to the judge and to every one who was present at the proceedings that, even although there might be other witnesses on the list who might give more reliable evidence on incidental points, not only would it be absolutely unjust to convict the accused in view of the character of the evidence already given, but the charge itself was false. Can it really be said to be a reasonable interpretation of the law that, under such circumstances, a Court should be bound to hear all the remaining witnesses before it could punish a complainant who had already made it abundantly clear that the charge that he came into Court

1. *(1899) 2 Tamb. 110.* 2. *(1899) Koch 54.*

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to prefer was unfounded? It is only necessary to put the proposition in that way to show that the two above-mentioned decisions by Lawrie, J., do not constitute a good working interpretation of § 197 of the Criminal Procedure Code. It is clear, I think, that each case should be decided on its own circumstances. In my opinion the circumstances here are sufficient to justify the action which the Police Magistrate has taken. He heard the evidence of both the complainant and his first witness; he was satisfied that the evidence of both was false and that the charge itself was false too; and he has recorded an incident which strongly corroborates the conclusion at which he arrived. "If complainant's demeanour "had not been enough, I should have been convinced when "his witness came into the box, and complainant deliberately "prompted him, before he could be stopped, to make a certain statement in support of the case for the prosecution." An incident of that kind occurring before a judge and jury would in most cases have led to an immediate acquittal. It is entitled to great weight in considering whether or not the Police Magistrate has correctly exercised the powers conferred upon him by § 197 of the Code. The only other point taken by the appellant's counsel was that the charge had not been shown to be vexatious. In support of that contention he referred to the decision of Withers, J, in *de Silva v. Mammadu* [1]. But that decision, in my opinion, does not in any way support the inference sought to be deduced from it. Withers, J., expressly held in that case that a complaint is vexatious where it is brought without cause. We have here a finding by the Police Magistrate, based upon ample evidence, that the charge brought by the complainant in the Police Court was deliberately false, and that charge was therefore "vexatious" within the meaning of that term as defined in *de Silva v. Mammadu* [1].

The appeal is dismissed.

Appeal dismissed.

Proctor for appellant.—*P. S. T. Chrysostom.*

1. (1897) 3 N. L. R. 3.

GOONEWARDENE *v.* SILVA *et al.*

No. 18,035, P. C., Negombo.

Present: **Lascelles, C. J.**

7th October, 1912.

Reference by a Police Court to the Village Tribunal of a charge not triable by that Tribunal—final order—appealable—Criminal Procedure Code No. 15 of 1898 § 338.

An order of transfer to the Village Tribunal of a charge which that Tribunal has no power to entertain is, as regards that charge, a final order within the meaning of § 338 of the Criminal Procedure Code, and is appealable.

Where the Magistrate transferred to the Village Tribunal charges under §§ 343 and 409 of the Penal Code and § 70 of the Police Ordinance,

Held, that the transfer is wrong, as the charge under § 70 is not within the jurisdiction of the Village Tribunal.

In this case the complainant charged the accused under § 343 of the Penal Code with using criminal force; under § 409 with committing mischief; and under § 70 of the Police Ordinance No. 16 of 1865 with abuse of authority as Police Officers. The Magistrate heard the evidence of the complainant and of his witness and referred the case to the Village Tribunal. Against this order the complainant appealed.

A. St. V Jayewardene for the appellant.—Whatever may be said with regard to the charges under §§ 343 and 409 of the Penal Code, that under § 70 of the Police Ordinance is clearly not triable by the Village Tribunal. The order referring the complainant to the Village Tribunal is therefore wrong. [*Lascelles, C.J.* How can you appeal without the sanction of the Attorney-General?] The order of the Magistrate is not one refusing to issue process or acquitting the accused, and does not come within § 337 of the Criminal Procedure Code. [*Lascelles, C. J.* Even then the order is not a final one, as you might get the Attorney-General to re-transfer the case to the Police Court.] We could not act on the order of

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the Police Magistrate, because we contend that the Village Tribunal has no jurisdiction to try the offence under § 70 of the Police Ordinance. If we go before the Village Tribunal we will be acknowledging its right to try the case. That is what we challenge. The order, if it stands, prevents the Police Magistrate from again trying the case, hence it is final so far as the Police Magistrate is concerned. An appeal would therefore lie.

Lascelles, C. J.—This is an appeal against an order of the Police Magistrate of Negombo. The accused in the case were charged under § 343 of the Penal Code with using criminal force; under § 409 with mischief; and under § 70 of the Police Ordinance of 1865 with abuse of authority as Police Officers. The Magistrate heard the evidence of the complainant, and he then referred the case to the Village Tribunal, as the offences appeared to be within the jurisdiction of that Tribunal. From this order the complainant now appeals.

Now the only difficulty that I can see in the case is as to the question of the procedure as to whether an appeal lies against an order of this nature, for on the merits of the case I see no room for any doubt at all. A charge under § 70 of the Police Ordinance is certainly not within the jurisdiction of the Village Tribunal, and the Magistrate was, in my opinion, wrong in referring the charge of this nature to that Tribunal. Then comes the question whether an appeal lies against an order of this description. I first of all was inclined to doubt whether the order under appeal is "a judgment "or final order pronounced by a Police Court within the "meaning of § 338 of the Criminal Procedure Code". But on considering the matter it seems to me that, although there is doubt as to the charges under §§ 343 and 409, and that it might be argued that an order transferring a charge under these sections to a Village Tribunal is not a final order, the case is otherwise as to the charge under § 70 of the Police Ordinance. In considering whether an order is a final order regard must be had to the effect of the order. If a Magistrate transfers

to the Village Tribunal a charge which that Tribunal has no power to entertain it seems to me that the order of transfer as regards that charge is a final order, for it finally disposes of the charge. In the present case, if the order of the Magistrate is allowed to stand, no charge can be maintained against the accused under § 70 of the Police Ordinance. I therefore have come to the conclusion that the order of transfer which relates to the charge under § 70 of the Police Ordinance is a final order, and that the order is appealable. As I have said, on the merits of the case I think there can be no question at all that the order made by the Magistrate is wrong. I therefore set aside the order of the Magistrate transferring the trial of this case to the Village Tribunal and direct him to proceed and try the complaint in the ordinary course.

Order set aside.

Proctor for appellant.—*C. J. Edirisinghe.*

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PERERA *v.* ABEYRATNE *et al.*

No. 33,620, D. C., Colombo.

Present: **Lascelles, C. J. & Pereira, J.**

21st October, 1912.

Civil Procedure Code § 344—execution of decree—suit by judgment-debtor to set aside sale on the ground of irregularities—parties to the suit.

A judgment-debtor who seeks to have a sale in execution of a decree set aside on the ground of irregularities cannot institute a separate action for the purpose, but should proceed in the same action as provided by § 344 of the Civil Procedure Code.

The fact that the purchaser is a stranger to the action in which the decree was passed will not prevent the application of § 344.

The plaintiff respondent in this case was the judgment-debtor in D. C., Colombo, 32,296. In that case one Sellappah Chetty obtained a hypothecary decree for a sum of Rs. 12,330·50 against the plaintiff-respondent and in execution

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of that decree two lands bound under the mortgage decree were ordered by the Court to be sold by the auctioneer. Before the sale Sellappah Chetty assigned and transferred the decree to the 1st defendant-appellant, and he was duly substituted plaintiff on the record. At the sale the two lands were purchased by the 1st and 2nd defendants for the sums of Rs. 4,200 and Rs. 5,200 respectively. The plaintiff-respondent thereupon brought this action to have the sales set aside on the following grounds: (1) that he had no notice of the conditions under which the sales were to be conducted and of the appointment of the auctioneer, (2) that no proper directions were given by the Court to the auctioneer regarding the conduct of the sales, (3) that there was no sufficient publication of the said sale, (4) that one sale was held at such a short time after the previous sale as to render it impossible for the majority of the would-be bidders who were present at the former sale to be present at the latter.

He further alleged that the lands were worth at least Rs. 18,000, and that he was considerably prejudiced by these irregularities.

The defendants denied the irregularities; and even admitting the irregularities, they denied that the plaintiff was entitled to the relief he sought. They also alleged that the plaintiff suffered no damage, and the plaint disclosed no cause of action. Several issues were framed, including the following issue of law "Does the plaint disclose a cause of "action against the defendants, and is plaintiff entitled to maintain this action?"

The learned District Judge held against the defendants on all the issues and gave judgment for the plaintiff in terms of his prayer. The defendants appealed.

H. A. Jayewardene (*Bawa*, *K. C.*, *A. S.-G.*, with him) for the appellants.—This action relates to the execution of the decree in D. C., Colombo, 32,296, and is therefore not main-

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tainable. § 344 is a bar to the present action. The fact that the auction purchaser is a third party and is interested in the result does not prevent the application of § 344. *Prosunno Kumar Sanyal v. Kali Das Sanyal*[1]; *Bastri Ram v. Fattu*[2]; *Dhani Ram v. Chaturbhuj*[3]; and *Daulat Singh v. Ingalkishore*[4]. The Privy Council has held in *Prosunno Kumar Sanyal v. Kali Das Sanyal*[1] that § 244 of the Indian Civil Procedure Code corresponding to § 344 of our Code, should be liberally construed. The District Judge is wrong in holding that § 344 applies only to executions carried out through the Fiscal and that it should be read with § 282. It applies to the execution of all decrees, whatever may be the mode of execution. Most of the sections falling under the head "general provisions" under which § 344 comes have been held to apply to mortgage actions where executions need not necessarily be carried out through the Fiscal. The remarks of Wood Renton, J., in *Sultan v. Packeer*[5] are *obiter*, and the judgment of the Privy Council was not cited in that case. In *Goonetilleke v. Goonetilleke*[6] the Privy Council ruling was cited, and Justice Wood Renton seems to have modified the view expressed by him in *Sultan v. Packeer*[5]. Apart from authority it would be highly vexatious to allow a fresh action to decide a matter arising incidentally in the execution of a decree in another case. The judgment-debtor has no cause of action at common law and he must rely entirely on the statutory remedy. Even where there is an allegation of fraud it has been held that § 344 applies.

Sampayo, K. C. (with *R. L. Pereira*) for respondent.—§ 344 of the Code should be read in connection with § 282. It is only to those cases to which § 282 would apply that § 344 also would apply. The sections of the Code coming under the chapter called "general provisions" have limited application, referring only to Fiscal's sales. In India they

1. *(1892) I. L. R. 19 Cal. 683.*
2. *(1886) I. L. R. 8 All 116.*
3. *(1899) I. L. R. 22 All 86.*
4. *(1899) I. L. R. 22 All. 108.*
5. *(1911) 14 N. L. R. 52.*
6. *(1812) 15 N. L. R. 272.*

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have no separate procedure for sales under a mortgage decree, and that accounts for the wide interpretation given to the Indian sections by the Courts. It is not in every case that a party can invoke § 344 to have matters arising from the execution of a decree to be settled.

Bawa, K. C., in reply.

c. a. v.

Pereira, J.—The 1st defendant in this case is assignee of the decree entered up in case No. 32,296 of the District Court of Colombo, which is a mortgage decree under § 201 of the Civil Procedure Code. In execution of that decree two parcels of land were put up for sale by the auctioneer named in it, and purchased by the 2nd and 3rd defendants respectively. The plaintiff, who is the judgment-debtor on the decree, brings this action to have the sale of the two parcels of land cancelled on the ground of certain irregularities which he sets forth in the plaint; and the question has been raised whether in view of the provisions of § 344 of the Civil Procedure Code it was open to the plaintiff to bring a separate action in this way to determine what, it is contended, is a question relating to the execution of the decree. I may, in passing, observe that if, in the above circumstances, the remedy by means of a separate action were open to a party, I doubt very much that he could, as the plaintiff has here done, amalgamate his claims in one action where two separate parcels of land have been sold under the decree to two separate individuals. But, as observed above, the only question for decision at present is whether a separate action could be brought at all. The terms of § 344 are quite clear. It runs thus :—

"All questions arising between the parties to the "action in which the decree was passed or their legal re-"presentatives and relating to the execution of the decree "shall be determined by order of the Court executing "the decree and not by separate action."

So that if the present question can be said to be a question between the parties to the original action, there can be no

doubt that the section would apply. It has been argued that in considering the meaning of the section its location in the Code should be taken into account. It is said that it appears in the Code as a section of chapter 22, and that therefore it applies to questions other than those specially provided for by § 282 in connection with such executions only as are treated of in that chapter. In the first place, the plain words of the section do not justify the assumption that it was intended to have such a limited operation. In the next, the section is one of several under the heading "general provisions", and it will be seen that under that heading there are several sections (I need not enumerate them here) that are obviously intended to have general application, and must necessarily be allowed operation in connection with the execution of decrees under § 201.

Now to come to the consideration of the question whether in view of the fact that the execution purchasers are not parties to the original action, the present question can be said to be one between "the parties to the action'' so as to bring it within the operation of § 344. The section of the Indian Code corresponding to this section is § 244. It is in parts material to the present inquiry expressed in substantially the same terms as those of the section of our Code; and so early as 1886 it was held by a Full Bench of the High Court at Allahabad (see *Basti Ram v. Fattu* [1]) that the provisions of § 244 of the old Indian Code of Civil Procedure prohibited, not only a suit between parties and their representatives but also a suit by a party or his representatives against a purchaser at a sale in execution of the decree, the object of which was to determine a question which properly arose between the parties or their representatives and related to the execution, discharge, or satisfaction of the decree. The action there was an action to set aside an execution sale on the ground that it was illegal and void as it contravened the provisions of a certain Indian Act known as the Rent Act. That decision was followed in the case of

1. (1886) I. L. R. 8 All. 146.

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Dhani Ram v. Chaturbhuj [1] and many other cases; and eventually, in the case of *Sanyal v. Kali Das* [2], on appeal from the High Court of Calcutta, the Privy Council held that where questions were raised between the parties to a decree relating to its execution, discharge, or satisfaction the fact that a purchaser at a judicial sale, who was no party to the decree of which the execution was in question, was interested and concerned in the result, had never been held to prevent the application of § 244 of the Civil Procedure Code limiting the disposal of those matters to the Court executing the decree. In the course of their judgment their Lordships observed as follows:—

> "It is of the utmost importance that all objections "to execute sales should be disposed of as cheaply and "as speedily as possible. Their Lordships are glad to "find that the Courts in India have not placed any "narrow construction on the language of § 244, and that "when a question has arisen as to the execution, discharge, "or satisfaction of a decree between the parties to the "suit in which the decree was passed the fact that the "purchaser, who is no party to the suit, is interested in the "result has never been held a bar, to the application "of the section."

This is a binding authority. Two local cases were referred to in the course of the argument—*Sultan v. Packeer* [3] and *Goonetilleke v. Goonetilleke* [4]. In the former no objection to the action appears to have been taken in the Court below, and there is no reference at all to such an objection in the judgment of Hutchinson, C. J.; but my brother Wood Renton incidentally refers to an argument by the Counsel for the appellant in that case based upon the above objection; and he says that in the view that he has taken of the question of costs it is unnecessary to deal at length with this argument, and disposes of the matter with an expression of opinion against the contention of the appellant's Counsel.

1. *I. L. R. 22 All. 86.*
2. *I. L. R. 19 Cal. 683.*
3. *(1911) 14 N. L. R. 52.*
4. *(1912) 15 N. L. R. 272.*

The Indian cases mentioned above do not appear to have been cited in that case. The ruling of *Goonetilleke v. Goonetilleke*[1], however, appears to me to accord with the appellant's Counsel in the present case. I would set aside the judgment appealed from and dismiss the plaintiff's action with costs.

Lascelles, C. J.—I entirely concur, and have only to add that in *Goonetilleke v. Goonetilleke* [1], to the decision of which case I was a party, the decision of the Privy Council in *Sanyal v. Kali Das* [2] was considered, and was the authority, so far as the judgment depended on authority, on which our decision was based.

Set aside.

Proctor for appellants—*A. C. Abeyewardene.*

Proctors for respondent—*Prins & Swan.*

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FULL BENCH.

CROWN CASE RESERVED.

THE KING *v.* KALU BANDA.

No. 16,189, P. C., Kegalle.

Present : **Lascelles, C. J. & Pereira & Ennis, JJ.**

23rd September, 1912.

Statement by an accused to a police officer—omission to set up the defence subsequently set up—admissibility of such evidence—statement suggesting inference of guilt—admission—confession—evidence of conduct—Evidence Ordinance No. 14 of 1895 §§ 17, 25 & 8.

The accused was tried for voluntarily causing grievous hurt to one B. The defence set up by him in his statutory declaration in the Police Court, and also in the Supreme Court, was that he had struck B with a mammotty in defending himself against an attack which B was making upon him with a knife. The prosecution proved that the accused had made a certain statement to a police officer (headman), and that in that statement he had not charged B with having attacked or threatened to

1. *(1912) 15 N. L. R. 272.* 2. *I. L. R. 19 Cal. 683.*

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attack him with a knife or mentioned that he had himself struck B with a mammoty.

Held that such a statemeut is a confession and therefore inadmissible in evidence under § 25 of the Evidence Ordinance.

The evidence of the police officer referring to the omission of the accused to set up the defence on which he subsequently relied was evidence of a statement by the accused suggesting the inference that the defence on which he relied was not set up by him at the time when, if true, it would naturally have been set up and that it was therefore false and consequently that he had committed the offence of which he was charged.

Per Lascelles, C, J.—When a police headman is allowed to prove that the accsued shortly after the offence was committed made a statement to him and in that statement he made no reference to the plea of self-defence, he is, in effect, allowed to prove that the accused made a statement which was different from and inconsistent with the defence which he afterwards set up. Proof of such a statement is something more than evidence of conduct under § 8 of the Evidence Ordinance.

Per Pereira, J. It is I think clear that if evidence of an actual statement suggesting an inference adverse to the accused is inadmissible, *a fortiori* would evidence be inadmissible which in a way is descriptive of a statement and which carries with it the insinuation that an exculpatory circumstance relied on by the accused for his defence was no part of his statement.

Per Ennis, J.—To allow evidence by a police officer of the substance of a statement made to him by an accused from which incriminating circumstances may be inferred,, would I consider, be contrary to the intention of § 25.

Deonis v. Peeris Appu[1] followed.

Imperatrix v. Pandharinath[2]; *Queen Empress v. Jamcharaam*[3]; *Queen Empress v. Mathews*[4]; *Empress v. Dibi Prasad*[5] referred to.

Elliot (with *B. F. de Silva* and *Guruswamy*) for accused.—The evidence of the headman was inadmissible, and should have been ruled out. In effect the prosecution proved a confession made by the accused to a police officer. [*Lascelles, C. J.* It was a statement made as a self-exculpatory excuse.]

1. *7 Tamb. 28.*
2. *I. L. R. 6 Bom. 34.*
3. *I. L. R. 19 Bom. 366.*
4. *I. L. R. 10 Cal. 1022.*
5. *I. L. R. 6 Cal. 530.*

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Such an excuse may amount to a confession. (See *Reg v. Pandharinath*[2]; *Ameer Ali on Evidence p. 435.*) Even if the point was raised in cross-examination the prosecution had no right to explain it in re-examination by eliciting an incriminating statement by the accused. (See *Queen Empress v. Mathews*[1]). [*Lascelles, C.J.* The actual statement made by the accused was not admitted.] But what he did not say was admitted. That must have had a bad effect on the jury, otherwise the accused would not have been convicted. The statements suggested the inference that the defence set up at the trial was false, and consequently that the accused had committed the offence of which he was charged. Such a statement is not admissible in evidence. (See *Dennis v. Peeris Appu*[3].)

Bawa, K. C., A. S.-G., for the Crown.—The evidence is not expressly excluded by the Ordinance. The statement that the accused did not say a particular thing is not evidence of a confession. It is not evidence, oral or documentary; if at all, it is evidence of conduct. In the cases cited the actual statement made were elicited from the witnesses, whereas in this case that was not done. The negation of a statement is not an admission. [*Ennis, J.* If you cannot prove the actual words, surely you cannot prove the effect of them.] Suppose the accused gave evidence, and stated that the deceased came at him with a knife, surely we would have been entitled to contradict him. [*Pereira, J.* Not by inadmissible evidence.] This evidence is clearly admissible as evidence of conduct under § 8 of the Evidence Ordinance.

c. a. v.

Lascelles, C. J.—This is a question with regard to the admissibility of evidence which has been reserved for the decision of this Court under § 355 of the Criminal Procedure Code. The circumstances upon which the question has arisen are fully set out in the case stated by my brother

1. *I. L. R. 10 Cal. 1022.* 2. *I. L. R. 6 Bom. 34.* 3. *7 Tamb. 28.*

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Wood Renton, and it is only necessary here to refer to them briefly. The accused was convicted of causing grievous hurt to one Balahamy. The defence set up by the accused in his statutory declaration in the Police Court, and also in the Supreme Court, was that he had struck Balahamy with a mammoty, but that he had done so whilst defending himself against an attack which Balahamy was making upon him with a knife. The question which we have to determine arose in connection with the statements which the accused made to the police headmen shortly after Balahamy was injured. Counsel for the Crown asked the headmen whether the accused had made a statement to them. The answer to this question was in the affirmative. He then proposed to prove that although the accused had made a statement to the headmen he had not in that statement charged Balahamy with having attacked or threatened to attack him with a knife, or made any reference to the use of a mammoty by himself. Objection having been made to questions having this purpose in view, the objection was over-ruled, and Crown Counsel elicited from the headmen that the accused in his statement had not said that Balahamy had attacked or threatened him with a knife or that the accused himself had used a mammoty. The learned Judge was of opinion that the failure of the accused to disclose to the headmen the grounds of his ultimate defence must have influenced the jury in arriving at their verdict of guilty; and he suggested that if his view as to the admissibility of the evidence in question was held to be incorrect the conviction should be set aside and the accused acquitted.

Mr. Elliot for the appellant contended that under § 25 the Evidence Ordinance 1895 the headmen, who are admittedly police officers, should not have been allowed to prove the omission of the accused to set up the defence on which he relied in the Police Court. § 25 enacts that "No confession "made to police officer shall be proved as against a person "accused of any offence." By § 17 (2) a confession is defined to be "an admission made at any time by a person accused

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"of an offence stating or suggesting the inference that he has "committed that offence." By the preceding sub-section an admission is defined to be "a statement, oral or documentary, "which suggests any inference as to any fact in issue or "relevant fact which is made by any of the persons and under "the circumstances hereinafter mentioned".

The question then which we have to determine is, whether the evidence which the headmen were allowed to give was evidence of an admission made by the accused stating or suggesting the inference that he had committed the offence with which he was charged.

The case for the Crown is that evidence that the accused was silent with regard to his plea of self defence was not evidence of "a statement, oral or documentary", by the accused; and it was further contended that what the accused said to the headmen did not amount to a confession.

It seems to me that when the headmen were allowed to prove that the accused, shortly after the offence was committed, made a statement to them and that in that statement he made no reference to the plea of self defence, they were in effect allowed to prove that the accused made a statement which was different from and inconsistent with the defence which he afterwards set up. I cannot regard this as admissible under § 8. It is of course in one sense evidence of conduct. But it is more than that. It is evidence of part of the substance of the statement, for the value of a statement by an accused person, in some cases, depends on what the accused omitted to say not less than on what he said. The effect on the mind of the jury could hardly have been different if the headmen had been allowed to give evidence of what the accused had actually said. But then arises the question whether what the accused said to the headmen amounts to an admission, whether it stated or suggested the inference that the accused had committed that offence. It is true that if regard is had to the object with which the statement was made it cannot be regarded as an admission; for nothing was further from the mind of the accused than to

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make any admission of his guilt. On this point we were referred to several Indian decisions to the effect that statements made by accused persons to police officers although intended to be made in self exculpation and not as a confession may nevertheless amount to an admission of incriminating circumstances and so be capable of proof under the section of the Indian Evidence Ordinance, which corresponds to § 25 of the Ceylon Ordinance. (*Vide Imperatrix v. Pandharinath* [1]; *Queen Empress v. Janecharam* [2]; *Queen Empress v Mathews* [3].)

We were also referred to the decision of Hutchinson, C.J., in *Deonis v. Peris Appu* reported in VII. Tambyah 28. In that case the accused was charged with being in possssession a stolen cow and a constable was allowed to depose that the accused, when asked by him whose the cow was, stated that it was his own and that he bought it some years ago. It was there held that this statement, although made without any intention of making a confession of guilt, was an admission within § 17 (1) inasmuch as it suggested an inference as to the material fact that the accused was in possession of the cow.

After hearing the arguments of counsel and referring to the cases which were cited in argument, I am of opinion that when the headmen were allowed to prove the facts that the accused had made statements to them and that he had not in these statements set up the plea of self defence, the headmen were allowed to give evidence of what was in substance a confession by the accused. They were allowed indirectly to disclose part at least of the substance of the accused's statement, the effect of this disclosure being such as to suggest the inference that the defence on which the accused relied was not set up by him at the time when, if true, it would naturally have been set up, and that it was therefore false.

If regard be had to the intention and object of the legislature in enacting § 25 of the Evidence Ordinance, I think the conclusion must be the same.

1. 6 Bom. 34. 2. 19 Bom. 366.
3. 10 Cal. 1022.

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It was recognised that police officers in Ceylon, as in India, are not always proof against the temptation of deposing that the accused made some statement the effect of which is to strengthen the case for the prosecution or to clinch the charge against the accused.

In order to prevent this abuse, and in view of the difficulty of testing the truth of statements made to police officers, the legislature had recourse to drastic means, and declared that no confessions made to a police officer shall be proved as against accused persons. But if police officers are allowed to go into the box and say "the accused, soon after the crime, "made a statement to me but in that statement he said not "one word of the defence he set up before the Magistrate," the object of the legislature will be to some extent frustrated ; police officers will be allowed in effect to exercise a power which the legislature considered could not be safely entrusted to them. For, so far as the probative effect of the evidence is concerned, there is a little difference between a police officer giving the particulars of a statement which is inconsistent with the defence and his stating in general terms that the accused, in his statement to him, did not mention the defence which he afterwards set up.

The evidence in either case tells heavily against the accused. In many cases it will turn the scale against him.

For the above reasons I am of opinon that the headmen should not have been allowed to give the evidence in question ; and in view of paragraph 6 of the case I would set aside the conviction of the accused and direct him to be acquitted.

Pereira, J.—The accused was on his trial for having voluntarily caused grievous hurt to one Balahamy, or, possibly, for a higher offence, as a result of his having caused such hurt: and the prosecution proved that the accused had made a certain statement to a police officer, and that in that statement he had not charged Balahamy with having attacked or threatened to attack him with a knife or mentioned that he himself had struck Balahamy with a mammoty.

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The accused's defence, as it appeared in his statutory statement made before the Police Court, was that he had acted in self defence in striking Balahamy with a mammoty, inasmuch as Balahamy was about to attack him with a knife. Presumably, the statement that the accused is alleged to have made to the police officer was a statement explanatory of the cause of injury on Balahamy, and the question is whether evidence was properly admitted of the part that a statement had been made by the accused and that in it he had not said that he was about to be attacked by Balahamy with a knife or that he himself had struck Balahamy with a mammoty. Now, the jury had before it evidence, led by the prosecution, to shew that the accused had struck Balahamy with a mammoty. If, in view of that fact, they treated as significant only that portion of the police officer's evidence in which it appeared that the accused had omitted in his statement to the police officer to say that he was about to be attacked by Balahamy, and drew from that omission the inference that the accused was not attacked by Balahamy with a knife, then the police officer's evidence would, in effect, have wiped out the only exculpatory circumstance in the statutory statement made by the accused leaving that statement as an unqualified admission of the fact that the accused had struck Balahamy with a mammoty. This is a contingency which, I think, may legitimately be taken into account in the present case. In the circumstances mentioned above, did § 25 of the Evidence Ordinance apply ? The Acting Solicitor-General argued, in the first place, that there was no evidence of any actual statement made by the accused ; and, in the next place, the evidence of the police officer did not amount to evidence of any confession by the accused. The term "confession" is defined in our Evidence Ordinance ; but it is left undefined in the Indian Evidence Act, with the result that, in India, in more than one case, it was given a strict interpretation. In *The Queen v. Macdonald* [1] and *The Empress v. Debi Prasad*[2] it was held that there was a distinction in the Act between admissions and confessions ; and that unless a statement

1. *10 B. L. R. 2.* 2. *6 Cal. 530.*

amounted to an outright confession, it would be receivable in evidence. Field, in his book on the law of Evidence in British India, cites later cases, and observes (page 143): "From these rulings it would seem doubtful whether *Queen* "*v. Macdonald* and *Empress v Debi Prasad* should now be "followed." There are still later decisions in which the Indian Courts would appear to have given the term "confession" the meaning given to it in the definition in Stephen's Digest of the law of Evidence, and that definition appears in its entirety in § 17 (2) of our Evidence Ordinance. Omitting parts immaterial to the present question, it may be said that § 17 enacts that an admission is a statement which suggests any inference as to any fact in issue or relevant fact, and a confession is an admission made by a person accused of an offence suggesting the inference that he committed that offence. Now, it was argued that, in the present case, evidence was not given of any specific statement made by the accused, and that, therefore, § 25 did not apply. The evidence led was to the effect that the accused had made a statement, and that, in that statement, there was no mention of the fact that he himself had been attacked by Balahamy. It is, I think, clear that if evidence of an actual statement suggesting an inference adverse to the accused is inadmissible, *a fortiori* would evidence be inadmissible which, in a way, is merely descriptive of a statement, and which carries with it the insinuation that an exculpatory circumstance relied on by the accused for his defence was no part of that statement. The greater includes the less. In the present case the jury had before it the statutory statement made by the accused in which he had shown that his defence was that he had acted in the exercise of the right of private defence of the person. The evidence in question in this case was calculated to have on the mind of the jury the effect of eliminating from the statutory statement of the accused the only circumstance he relied on in that statement as a defence, namely, the circumstance that he himself had been attacked. The evidence was as much open to objection as it would have been had it been evidence of the actual contents of the

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statement alleged to have been made by the accused to the police officer.

Ennis,

Another view that might be taken is that the evidence given by the police officer was tantamount to evidence of a statement by the accused to the effect that Balahamy did not attempt to attack him with a knife.

I think that the principles on which the exclusion of evidence of outright confessions is based have equal application to the exclusion contended for in the present case.

As regards § 8 of the Evidence Ordinance, I need only say that although evidence of conduct may be led under that section, the evidence should be such as would not contravene the provisions of any other section of the Ordinance.

In view of the above, and of what is stated by my brother Wood Renton in the 6th paragraph of his statement of facts, I think that the conviction should be set aside and the accused acquitted.

Ennis, J.—In this case evidence by a police officer was admitted that the accused had made a statement to him which differed from a statement made by the accused to the Police Magistrate.

Section 25 of the Evdence Ordinance says "no con-"fession made to a police officer shall be proved as against a "person accused of any offence".

It is conceded that under this section it was not open to the prosecution to prove any statement made by an accused to a police officer relating to circumstances which would incriminate the accused.

To allow evidence by a police officer of the substance of a statement made to him by an accused from which incriminating circumstances may be inferred would, I consider, be contrary to the intention of § 25. For if the statement really were an admission of some incriminating circumstance, it could not be proved, and, if not such an admission, and

therefore not a confession defined by § 17 (2) of the Evidence Ordinance, no inference incriminating the accused could safely be drawn from the statement or from the substance of it.

The police officer's evidence was to the effect that a statement made by the accused differed from one made to the Magistrate, and, in my opinion, leads to an inference that accused had made a "confession". The evidence I consider went further than mere evidence of conduct. Moreover I think it would not be admissible as evidence of conduct under section 8 of the Evidence Ordinance. Explanation 1 of that section seems to me to preclude it. In this case it would be evidence of conduct from a statement by showing what the statement did not contain.

I therefore consider the evidence relating to the nature of the statement made by the accused in this case to the police officer was inadmissible.

I would acquit the accused.

———:o:———

MOHAMEDBHOY *et al.* *v.* MOHAMADU LEBBE MARIKAR *et al.*

No. 24,875, D. C., Colombo.

Present: **Lascelles, C. J. & de Sampayo, J.**

22nd July, 1912.

Fidei-commissum—Fiscal's sale of fidei commissary's interest during life-time of fiduciarius—expectant or contingent interest—voluntary sale by fidei commissary—subsequent death of fiduciarius—whether title enures—exceptio rei venditæ et traditæ—estoppel—registration of deed—fraud—remedy of party defrauded by vendor—Civil Procedure Code § 218 (k)—Ordinance No. 7 of 1840 § 2.

During the lifetime of the fiduciary the interest of a fidei-commissary in property subject to a *fidei commissum* is an expectancy of succession by survivorship within the meaning of § 218 (k) of the Civil Procedure Code, and is not capable of seizure and sale.

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Lushington v. Samarasinghe [1] distinguished.

Where a fidei commissary sells such an interest title does not enure to the purchaser on the death of the fiduciary, and a purchaser subsequent to the death of the fiduciary has a superior title.

The plea of *exceptio rei venditæ et traditæ* is not available to a party who has never been in possession, and though it is available against a vendor it is not available against a subsequent purchaser from the vendor.

Alwis v. Fernando [2] followed.

Per Lascelles, C. J.—If the 5th defendant, when he purchased, failed to search the register or bought the share notwithstanding the registration, he accepted a serious risk; but I fail to see that he is in the same position as a vendor who when he has no title to give, and subsequently when he has obtained title, repudiates the sale and sets up his newly acquired title against the purchaser.

Per de Sampayo, J.—The only remedy of the party defrauded is to sue for damages against the vendor.

This is a partition action. Lawrens Gomis, the original owner of the premises sought to be partitioned, died leaving a last will whereby he bequeathed and devised the said premises to his son Lawrens Gomis (jr.) subject to a fidei commissum in favour of his children. Lawrens Gomis (jr.) died on the 11th June, 1900, leaving two children, Lily Gomis (1st plaintiff) and Benjamin Gomis (1st defendant) and the following grand-children, Caroline Elizabeth Gomis, the only surviving child of a deceased daughter Petronella Geraldine Gomis, and the 2nd, 3rd, and 4th defendants, the children of another deceased daughter, Johanna Gomis. The contest was between the 5th and 13th defendants-respondents on the one side and the intervenients-appellants on the other side as regards the shares of Caroline Elizabeth and Benjamin Gomis. The 5th defendant claimed to be entitled to Caroline's life-interest in an undivided $\frac{1}{4}$ share of the land by the following claim of title. Caroline Elizabeth, after the death of her grandfather Lawrens Gomis, by deed No. 8,053 dated 23rd June, 1900, transferred her interest in the land to one Manuel

1. *(1897) 2 N. L. R. 295.* 2. *(1911) 14 N. L. R. 92.*

de Silva. Manuel de Silva, by deed No. 8,054 dated 23rd June, 1900, sold the same to Abdul Caffoor, who in turn, by deed No. 10,541 dated the 1st October, 1900, transferred it to the 5th defendant. The 13th defendant claimed Benjamin Gomis' life interest in an undivided ¼ share by deed of transfer No. 1,334 dated 15th November, 1902, executed in his favour by Benjamin Gomis.

The intervenients claimed Caroline Elizabeth's share in the following manner. Caroline Elizabeth, by deed No. 1,257 dated 17th April, 1897, before the death of Lawrens Gomis (jr.), transferred her life-interest to Carimjee Jafferjee, who conveyed the same by deed to Alibhoy, who in turn conveyed it to the intervenients. The deed of 1897 was duly registered. They claimed Benjamin Gomis' share thus:—In execution of a decree obtained against Benjamin Gomis his interest was sold and purchased by Palaniappa Chetty under Fiscal's transfer No. 6,103, dated 23rd September, 1895, and registered on the 30th May, 1896. Palaniappa Chetty conveyed his interest to Carimjee Jafferjee who in turn conveyed it to the intervenients.

The parties went to trial on the following issues :—

1. Under transfer No. 1,201 did title to a ¼ of the premises in question vest in Carimjee Jafferjee on the death of Lawrens Gomis (jr.)?

2. Under Fiscal's transfer No. 6,103 did title to a ¼ of the premises in question vest in Carimjee Jafferjee on the death of Lawrens Gomis (jr.)?

3. Are the 5th and 13th defendants estopped from questioning the title of the intervenients (on account of the registration of the latter's deeds)?

4. Prescriptive rights of 5th and 13th defendants. (It was admitted that the intervenients never had possession.)

The learned District Judge held that Caroline and Benjamin Gomis (1st defendant) had nothing more than an

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xpectancy of succession by survivorship, and that neither Caroline nor 1st defendant had any interest which they could dispose of or was capable of being seized and sold by the Fiscal. He further held that on the death of Lawrens Gomis (jr.) the position of the intervenients' predecessors in title was in no way improved in the absence of same deed of confirmation or other deed being executed by Caroline Gomis and the 1st defendant in favour of Carimjee Jafferjee after the death of Lawrens Gomis (jr.), and he accordingly dismissed the intervenients' claim with costs. They appealed.

Samerewickrame (with *Cooray*) for the intervenients-appellants :—On the death of the fiduciary title enured to the appellants, and our title must prevail over that of the 5th respondent. (See *Berwick's Voet 542.*) A fresh deed was not necessary to give us title, because in this case title passed not by convention but by operation of law. Ordinance No. 7 of 1840 only applies to transfers by convention. This principle has been applied to cases of trust. (See *Ibrahim Saibo v. O. B. C.*[1]) If Caroline Elizabeth would have been precluded from setting up title against her vendor or his successors in title [*Guruhami v. Subaseris*[2]] surely a subsequent purchaser would also be precluded. An estoppel binds parties and their privies, and at the time of the purchase the 5th defendant-respondent must have been aware of the transfer in favour of our predecessor, inasmuch as the deed in his favour was duly registered.

As regards the contest between the appellants and the 13th defendant, the case of *Lushington v. Samarasinghe*[3] is conclusive. The interest of the fidei commissary was not a "contingent interest". Once the will began to speak the rights of the various parties became effectually fixed.

Bawa, K. C. (with *F. M. de Saram & E. G. P. Jayetileke*) for the 5th defendant-respondent :—The *exceptio rei venditæ et traditæ* is available only to a person who has had possession and to whom there has been a delivery of the thing sold.

1. (1900) 3 N. L. R. 148. *2. (1910) 13 N. L. R. 112.*
3. (1897) 2 N. L. R. 295.

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(See *Berwick's Voet p. 542.*) The deed in favour of the appellants' predecessor in title is in effect nothing more than an agreement to sell. The deed in our favour has not been set aside, and we still remain owners. The case of *Alvis v. Fernando*[1] is on all fours with the present case.

H. J. C. Pereira (with *F. M. de Saram*) for the 13th defendant-respondent. The case of *Lushington v. Samarasinghe*[2] is an authority in my favour. It was a case of usufruct, and therefore there was a vested saleable interest. Under § 218 "a hope of succession" cannot be seized and sold.

Samerewickrame in reply. The exception *rei venditæ et traditæ* has the effect of repelling the claim of a subsequent alienee [*de Sampayo, J.*—Would that apply to a person purchasing *oneroso titulo* ?] It would. (See *Berwick p. 533.*) In *Lushington v. Samarasinghe*[2], Lawrie, J., argued on the footing that there was no vested interest in the judgment-debtor. A "spes successionis" can be sold. (See *Voet* 18-1-13.)

Lascelles, C. J.—It is unnecessary to recapitulate the facts with reference to the appellant's intervention, which are fully dealt with in the judgment of the learned District Judge. The intervention relates to two ¼ shares, namely : (1) the share which devolved on Benjamin Gomis, the 1st defendant, under his grandfather's will, which share is now claimed by the 13th defendant by purchase from the 1st defendant ; and (2) the share which devolved on Caroline (a great grand-daughter of the testator) under the same will, which share is now claimed by the 5th defendant under a series of deeds beginning with a conveyance from Caroline dated the 23rd June, 1901, at which date both her mother and grandfather were dead.

The claim of the intervenients to the first of these shares, that is the share which devolved on the 1st defendant, presents no serious difficulty.

1. (1911) 14 N. L. R. 92.　　*2. (1897) 2 N. L. R. 295.*

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It is based on a Fiscal's transfer dated the 23rd September, 1895, and registered on the 30th May, 1896, in favour of one Palaniappa Chetty, who conveyed the share to Carimjee Jafferjee, who in turn conveyed to Mohamedbhoy Allibhoy, the intervenient's vendor.

The question is, whether this share, in view of the provisions of § 218 (k) of the Civil Procedure Code, was liable to seizure or sale in execution of a money decree. This sub-head of § 218 provides that "an expectancy of succession by survivorship or other merely contingent or possible right of interest" is not liable to seizure or sale. When the 1st defendant's share was sold in execution his father, Lawrens Gomis, the younger, the *fiduciarius* under the will, was still living; so that the interest of the 1st defendant was expectant on his surviving his father, and the extent of the share which the Fiscal's transfer purported to convey was not ascertainable at the date of that instrument. If other children had been born to Lawrence Gomis, the younger, after the date of the Fiscal's transfer, the share would have been less than $\frac{1}{4}$; if any of Lawrens Gomis' four children had died after that date without direct issue, it would have been more than $\frac{1}{4}$. The interest of the 1st defendant in my opinion falls within the language of § 218 (k) of the Civil Procedure Code.

The intervenients-appellants rely on the judgment of Lawrie, J., in *Lushington v. Samarasinghe*[1]; but the facts in that case were widely different. It was a case of a deed of gift, not of a will, which it was held created no *fidei commissum*. The *ratio decidendi*, as appears from the judgment of Lawrie, J., as well as from that of Withers, J., was that the true effect of the deed was to give the donees a present right or immediate interest in the property, and that there was nothing expectant or contingent about the gift. This decision has plainly no application to an interest such as that which purported to pass by the Fiscal's sale of the 1st defendant's interest.

1. (1897) 2 N. L. R. 295.

I am of opinion that the interest of the 1st defendant was not capable of seizure and sale, and that the intervenients-appellants, whose title depends on the validity of the Fiscal's transfer, are not entitled to that share. With regard to the other ¼ share, the intervenient's case is that the conveyance to Carimjee Jafferjee, though made by Caroline in the lifetime of her father, became perfect on the death of her father, and that on that event Carimjee Jafferjee obtained a good title, which he has transmitted to the intervenients-appellants.

The 5th defendant-respondent's case is that inasmuch as the *dominium* was not vested in Caroline at the date of the conveyance to Carimjee Jafferjee, that instrument passed no title to Carimjee Jafferjee, and that, in the absence of a further notarial conveyance from Caroline, the death of Lawrens Gomis, the younger, in no way cured the defect in Carimjee Jafferjee's title.

The intervenients-appellants rely on the *exceptio rei venditæ et traditæ*. But apart from the question whether this plea is available in view of Ordinance No. 7 of 1840, it is dfficult to see how it is properly applicable in the present case. Under the Roman Dutch Law a purchaser in possession, if he were evicted by his vendor, had the right either to submit to eviction and sue his vendor for damages or he might meet the claim to evict him by the *exceptio rei venditæ et traditæ*. But here there is no question of evicting a purchaser in possession. It is the intervenients who are themselves setting up the claim, and they have never been in possession. It is thus clear that the intervenients-appellants are not entitled to the benefit of this particular plea. But there is a wider question involved, namely, whether the intervenients-appellants are entitled to set up any sort of equitable title on the ground that Caroline before she sold the land to the respondent's predecessor in title had already sold it to Carimjee Jafferjee, from whom the intervenints-appellants' title is derived.

It may be admitted that if Caroline Elizabeth, after her title had been perfected by her grandfather's death, had

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herself attempted to set up title against Carimjee Jafferjee or his successors in title she would have been precluded from so doing. But does a similar equity arise as against the defendants? A question almost identical to this was discussed and decided in *Guruhami v. Subaseris*[1], which was decided on the principle that the provisions of Ordinance No. 7 of 1840 are not to be used to cover fraud or what is tantamount to fraud.

In order for the intervenients-appellants to succeed they must show that the 5th defendant-respondent stands on the same footing as regards the intervenients-appellants as Caroline herself.

In *Guruhami v. Subaseris*[1] the estoppel was limited to the transaction between the appellant and the 3rd defendant-respondent, and it was held that the latter had an equitable claim to have the title conferred on her by the appllant herself upheld. If Caroline herself had set up title against any of the purchasers in the first line of sale, her conduct would no doubt have been dishonest and fraudulent, and she would not have been allowed to take advantage of her own dishonesty; but it is clearly otherwise with the purchasers from Caroline in the second line of sale under which the 5th defendant derives title. The mere fact that the sale to Carimjee Jafferjee was registered is obviously insufficient to raise any equity against the 5th defendant. If the 5th defendant, when he purchased, failed to search the register or bought the share notwithstanding the registration, he accepted a serious risk; but I fail to see that he is in the same position as a vendor who, when he has no title to give, and subsequently, when he has obtained title, repudiates the sale and sets up his newly acquired title against his purchaser. The element of fraud involved in the latter transaction is wanting in the purchase by the 5th defendant.

The intervenients-appellants also rely on the passage in *Voet 21. 3. 1*, which lays down the proposition that where the

1. (1910) 13 N. L. R. 112.

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right of an alienator (which was defective at the time of the alienation) is confirmed, the right of the alienee is confirmed as soon as the defect in the vendor's title is confirmed.

The applicability of this principle was considered in *Don Carolis v. James*[1]. In that case the Commissioner of Requests held that when the vendor got a full title to the land (which he had not at the time of the sale) his rights enured to the defendant. But Hutchinson, C. J., reversed the decision, holding that the transfer of land must since the passing of Ordinance No. 7 of 1840 be made in the manner prescribed by § 2 of the Ordinance; and all that the plaintiff obtained by his deed was a right to have a transfer from his vendor as soon as the latter had obtained his title from the Crown.

This decision is fatal to the intervenients-appellants' contention on this point. In my opinion the appeal fails, and must be dismissed with costs.

de Sampayo, J—I agree with the judgment of my Lord the Chief Justice. Mr. Samarewickrame, who ably argued the case for the appellants, cited *Voet 21. 3. 1*, to the effect that where a vendor had no title at the time of sale but afterwards acquires title the purchaser's title is confirmed from the time that the vendor so acquires title, and the purchaser can by right of ownership sue even third parties in possession; and he thereupon argued that this mode of acquisition by operation of law was not affected by Ordinance No. 7 of 1840, which only governed the conventional mode of acquiring title to land. In illustration of this he instanced the case of a person who purchases property in the name of another person and in whose favour a resulting trust arises notwithstanding the provisions of the Ordinance No. 7 of 1840. The illustration is unhappy, because in such a case the law gives to the first person, not a direct title to the property, but only a right of action founded on fraud to compel the trustee to transfer the property to

1, 1 *Cur. L. R. 224.*

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him, and gives no right of action at all against *bona fide* purchasers from the trustee. The case of husband and wife married in community of property is more apposite. But matrimonial rights of this kind are *sui generis*, and in no way bring about the frauds which the Ordinance No. 7 of 1840 struck at, and have always been recognised by Courts of Law without any reference to the provisions of that Ordinance. However, it is not very clear that under the Roman Dutch Law title really passes to a vendee in the circumstances supposed. The passage from Voet above referred to is from his title on the subject of the equitable plea *exceptio rei venditæ et traditæ*, and Voet appears to speak of a fictitious rather than a true ownership passing to the vendee, who would thus have a sufficient right to claim possession against the vendor himself or against a third party in possession by means, not of the vindicatory action, but of the *actio publiciana* which is given to a person who is owner only by legal fiction. The matter is made more clear in *1 Nathan 379*. So far as I can see *Voet* nowhere discusses the question as to the respective rights of a first purchaser who purchases before the vendor acquires title, and of a second purchaser who purchases after that event. I think on the whole that the Ordinance No. 7 of 1840 must have full operation, as was decided in *Don Carolis v. James*[1], which again is in harmony with the decision of the full Court in *Kadirawetpulle v. Pina*[2], which held that without a further deed from the vendor after he acquired title the purchaser had no right.

It was next argued that the *exceptio rei venditæ et traditæ*, which is available to the first purchaser against the vendor (*Guruhamy v. Subaseris*[3]), was also available against the second purchaser inasmuch as estoppels bound parties and privies. A similar argument was attempted to be maintained in the case of a mortgage and a sale, but was repelled in *Alwis v. Fernando*[4]. I think this decision applies to the present case. For the purpose of the contest between the appellants and the respondents it will not help the appellants

1. *1 Cur. L. R. 224.* 2. *9 S. C. C. 36.*
3. *(1910) 13 N. L. R. 112.* 4. *(1911) 14 N. L. R. 92.*

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to say that the respondents are privies in estate to Caroline Gomis from whom both parties claim a ¼ share. It must be borne in mind that an estoppel creates no title but only prevents the party bound by it from saying that he had no title. In such a case as this, the vendor himself is debarred from asserting his subsequently acquired title against his vendee, but if the property has also been transferred by him to a third party, the vendee cannot set up title against such third party, and his only remedy is damages against the vendor. See the judgment of Brett, in *Simm v. Anglo-American Telegraph Co.*,[1] and *Cababe* on *Estoppel* pages 116 and 117.

In my opinion the respondents have better title to the ¼ share claimed through Caroline Gomis. As regards the ¼ share which originally belonged to the 1st defendant and was sold against him in execution, I think the respondents are in a much stronger position as pointed out by the Chief Justice in whose judgment I entirely concur. I agree that this appeal should be dismissed with costs.

Appeal dismissed.

Proctor for appellants—*De Vos & Gratiaen.*

Proctor for 5th defendant-respondent—*A. C. Mohammadu.*

Proctor for 13th defendant-respondent—*C. A. de Silva.*

1. *L. R. 5 Q. B. D., 206, and 207.*

J. J. DE FONSEKA *v.* M. A. FERNANDO.

No. 4827, D. C., Kalutara.

Present: **Lascelles, C. J. & Wood Renton, J.**

13th November, 1912.

Registration—Last will creating annuity—residuary estate subject to tacit hypothec—non-registration of probate—registration of conveyance by residuary legatee—adverse interests—tacit hypothec void—§§ 16, 17, 18 and 22, Land Registration Ordinance, 1891.

The plaintiff, who was an annuitant under the will of the testator, and who was in a former action declared entitled to a tacit hypothec over the residuary estate of the testator, sued the defendant for a declaration that a land purchased by the latter from the residuary legatee was subject to the plaintiff's hypothec. Neither the probate of the will creating the annuity nor the tacit hypothec was registered, but the defendant's conveyance was registered.

Held, that the defendant's interest under his deed is adverse to that of the plaintiff under the will and that the tacit hypothec created by the will in favour of the plaintiff is void by reason of the registration of the defendant's conveyance.

A probate of a will is a registrable instrument under § 16 of the Registration Ordinance No. 14 of 1891, and the provisions of the following section of the Ordinance are applicable to it.

Per Lascelles, C. J.—The will is void only *quoad* the adverse interest claimed by the defendant, that is, the right to hold the land free of the tacit hypothec created by the will.

Per Wood Renton, J.—The right to recover any one payment of an annuity accrues whenever it becomes due and prescription begins to run from the date when the first annuity becomes payable.

Gauder v Dissanayake[1] followed.

De Sampayo, K. C., (with him *Cooray*)—for the appellant, contended that the question of registration did not arise in a case of this kind. There was nothing which the appellant could have registered. Section 18 does not apply to a will. Even if the probate had been registered under § 16, there would have been nothing to indicate that the property was subject to this tacit hypothec. The interests of the plaintiff

and the defendant are not adverse. Both claim from the same source, and if, by reason of non-registration, the will is void, the foundation of the respondent's claim also disappears.

H. A. Jayawardene, with *A. St. V. Jayawardene*, for the defendant-respondent—contended that the judgment of the District Judge was right. The probate of the will can be registered under § 16, and § 22 requires that when probate is registered, a list of lands belonging to the estate should be produced. § 18 permits a party gaining an interest or benefit under an instrument registrable under § 16 to have the same registered. The appellant gained a benefit under the will, and he should have got the probate registered under § 18. The interests of the parties are adverse. The plaintiff is trying to create a tacit hypothec over the defendant's lands. Defendant's claim is free of this encumbrance—see *Gauder v. Dissanayake*[1]. The policy of the Registration Laws is to protect persons in the position of the respondent.

On the question of prescription also the defendant is entitled to succeed. The defendant has never paid any share of the annuity and has been in possession of the property for over 20 years, without recognizing any right in the plaintiff.

De Sampayo, K. C., in reply—

As regards the question of prescription, the District Judge has rightly held that the claim of the plaintiff is not prescribed. So long as the annuity was paid to the plaintiff by any one of the persons liable, it was kept alive as against all who purchase the properties subject to the annuity. The obligation was an indivisible one.

c. a. v.

Lascelles. C. J.—The plaintiff in this case is entitled under the will of his father, the late Manuel de Fonseka who died in 1878 to an annuity of Rs. 480; and in a former action (No. 2,832, D. C., Kalutara) it was decided that, in respect of this annuity, the plaintiff had a tacit hypothec over

Fonseka v. Fernando.

Lascelles, C. J.

the testator's residuary estate. The plaintiff in his plaint averred that he had received or recovered all sums which were due to him on account of the annuity up to the 11th of February, 1911, and that there was due to him in respect of the subsequent year the sum of Rs. 480. His claim is that a land named Modillagahawatte, which the defendant had bought in 1892 from S R. Fonseka, the residuary legatee, should be declared bound and executable for payment of this sum. The District Judge has decided the case on the ground that the tacit hypothec created by the will is void by reason of the registration of the defendant's deed. I have come to the conclusion that this decision is correct. It is clear in the first place that the probate of a will is a registrable instrument under § 16 of the local Registration Ordinance, 1891, and that, as such, it is an instrument to which the provisions of the following sections are applicable. It is also clear that if the annuitant had registered the probate of the will, producing the inventory and a proper description of the land in accordance with § 22, the defendant if he had examined the register would have had notice of the annuity and so would have received the protection which the Ordinance is intended to give to purchasers who register their deeds. But the applicability of § 17 depends upon whether the defendant is claiming under his deed an interest which is adverse to that of the plaintiff under the will of Manuel de Fonseka. Apart from authority it is clear to me that the defendant's interest under his deed is adverse to that of the plaintiff under the will. The defendant's deed conveyed the property to him without mention of the annuity: it was on its face a conveyance free from this encumbrance.

The plaintiff claims that by virtue of the dispositions of the will the property is charged with the payment of the annuity. The interests are thus clearly adverse. The defendant claims the land free of the annuity; the plaintiff claims a charge of the annuity on the land. This was the view adopted by the Privy Council in a somewhat analogous case namely, *Gauder v. Dissanayake*[1].

1. *4 Bal. 122.*

It is ingeniously argued that if the will is declared void as against the defendant's deed the foundation of the defendant's title is cut away inasmuch as his vendor's title is derived from the will—But the will of course is only void *quoad* the adverse interest claimed by the defendant, that is the right to hold the land free of the tacit hypothec created by the will. It was also contended that the claim was prescribed but it is not necessary now to enter into that question.

I would dismiss the appeal with costs.

Wood Renton, J.—I have had the advantage of reading, and have little to add to, the judgment of my Lord the Chief Justice. The appellant's tacit hypothec under the will and the respondent's interest under his deed are clearly adverse, and I quite agree that, both in law and as a matter of policy, the former is void as against the latter by reason of the non-registration of the probate. The question as to the prescription of the annuity does not arise in view of the appellant's allegation that he had received or recovered all sums due to him on account of the annuity up to 11th February, 1911. But I may point out that it would seem to result from the cases of *Edwards v. Warden* [a] and *Hughes v. Coles* [b] that the right to recover any one payment of an annuity accrues whenever it becomes due, that the right to future payments is enforceable whenever each of these becomes due, and that time runs from the date when the first annuity became payable.

(*a*) (*1874*) *L. R. 9 Ch. 495*, (*1876*) *1 A. C. 281*
(*b*) (*1884*) *27 Ch. D. 231.*

A. C. MOHAMMADU *v.* BABUN.

No. 11,285. C. R., Galle.

Present: **Pereira, J.**

14th November, 1912.

Improvements made by leave and license of owner—acquiescence—bona fide possessor—jus retentionis.

A person who has made improvements upon a land with the leave and license of the owner, is entitled to the *jus retentionis* and all the other rights of a *bona fide* possessor.

Leave and license is an intensified form of acquiescence.

This was an action against the defendant for a declaration of title to, and for ejectment from a house standing on the plaintiff's land. The defendant pleaded that he built the house in question and that he made a plantation of 47 cocoanut trees on the said land with the leave and license of the plaintiff's vendor, and therefore, he was not liable to be ejected until compensated for the said improvements. The learned Commissioner of Requests held that the defendant was entitled to compensation for the said house and plantation but that he was not entitled to the *jus retentionis* inasmuch as his possession was not *ut dominus* and he accordingly entered judgment in favour of the plaintiff as prayed for with costs.

The defendant appealed.

de Zoysa (with *H. A. Jayawardene*) for the defendant-appellant.—The defendant having improved the land with the leave and license of the plaintiff's vendor acquired all the rights of a *bona fide* possessor. The case of *Eliatambi v. Sinatambi* is on all fours.

A. St. V. Jayawardene (with *E. G. P. Jayetileke*), for the plaintiff-respondent.

It is admitted that the defendant made his improve-

1. 2 S. C. D. 54.

ments with the leave and license of the owner. Therefore in respect of the improvement made on such leave and license, the improver cannot be said to be in the position of a *bona fide* possessor. If a man obtains permission merely to live on a land, and then makes a plantation without the owner's leave or license, but with his acquiescence, the improver might claim the right of a *bona fide* possessor in respect of such plantation. But when the improvement for which a right of retention is claimed has been made with express leave and license the improver cannot be a *bona fide* possessor in respect of it. [*Pereira, J.* Is not a "leave and license" an intensified form of acquiescence?] No. Acquiescence leads the improver into the belief that he has the right to effect the improvements. A person who improves with the owner's leave and license cannot consider himself to be the owner, which is the characteristic of a *bona fide* possessor. The judgment cited has no application to the facts of this case.

c. a. v.

Pereira, J.—The Commissioner has decided, and I think rightly, the first and second issues in the defendant's favour. He has held that the defendant built the house on the land in question and made the plantation on the land with the leave and license of the plaintiff's vendor. Leave and license is only an intensified form of acquiescence, and if there was mere leave and license and nothing more, the defendant would be entitled to all the rights of a *bona fide* possessor. He would certainly be entitled to the *jus retentionis.* I set aside so much of the decree as directs that the defendant be ejected from the house on the land described therein and that the plaintiff be put and placed in possession thereof and condemns the defendant in damages and costs. The defendant may remain in possession of the house and plantation made by him until he is paid compensation therefore. He will have his costs in both Courts.

Set aside.

Proctor for appellant—*A. D. Jayesundere.*

Proctor for respondent—*R. A. H. de Vos.*

PILORIS SILVA *v.* WILLIAM SILVA *et al.*

No. 26,749, C. R. Colombo.

Present: **Lascelles, C. J.**

23rd January, 1913.

Rei Vindicatio action—action by purchaser at execution sale pending mortgage action against purchaser under mortgage decree—no Fiscal's transfer at date of action in favour of defendant—sufficient if obtained before trial.

The right obtained by a purchaser at a sale in execution, during the pendency of a mortgage action is subject to the result of the mortgage action and subject to the decree therein.

He is not entitled to a declaration of title and an order of ejectment as against the purchaser under the mortgage decree.

Saminappu v. Dissanayake[1] followed.

The defendant by his bond dated 3rd October, 1892, duly registered, mortgaged his life interest in certain property to the added-defendant. The added-defendant put his mortgage bond in suit on the 9th of October, 1908, and obtained a decree on the 20th October, 1908. The plaintiff who was decree-holder in a money case against the defendant had the defendant's life interest in the same property seized and sold, and purchased the same on the 25th January, 1909, and obtained his Fiscal's transfer on the 10th July, 1909. He instituted the present action against the defendant and added-defendant, on the 22nd of February, 1912, claiming a declaration of title. The added-defendant, though he purchased the life interest aforesaid at the mortgage sale on the 28th day of April, 1909, obtained his Fiscal's transfer on the 27th May, 1912, *i. e.* after the institution of plaintiff's action. The Commissioner of Requests gave judgment for the plaintiff on the ground that at the date of the institution of the action, the added-defendant had not obtained a Fiscal's conveyance. "The decree in this case," he says, however, "will not bar the added-defendant from instituting another action, if he is so advised."

Silva v. Silva.

Lascelles, C. J.

E. W. Jayawardene with *L. H. de Alwis*, for defendants-appellant:—The plaintiff's title is subject to that of the added-defendant, as he purchased the property pending the mortgage action brought by the defendant. [*Samiappu v. Dissanayake*[1]; Jayawardene on Mortgage pp. 112 *et seq.*]

The defendant's action is to be considered pending until judgment has been satisfied by execution. [*Salt v. Cooper*[2]; Hukm Chand on *Res Judicata*, § 275.]

The principle enunciated by Wendt, J., has been consistently followed. Delay in obtaining a Fiscal's transfer is often due to causes beyond the control of parties. The position of a plaintiff is different from that of a defendant [*Carolis v. Perera*[3].] The plaintiff need not come to Court until he has obtained his Fiscal's transfer. The defendant is entitled to produce his Fiscal's transfer at any time before trial, otherwise his title is worthless and is liable to be defeated by any subsequent sale by the judgment-debtor.

Sunmugam Chetty v. Khan[4] was also referred to.

Samarawickreme, for plaintiff-respondent.—The position of the parties must be considered as they existed at the date of action [*Silva v. Nona Hamine*[5].] The case referred to viz. *Carolis v. Perera*[3] is a partition action, which stands on a different footing from an action for declaration of title.

Lascelles, C. J.—This case raised a question of law of some little difficulty. The added-defendant purchased the life interest which is the subject of the action, under a mortgage decree. During the pendency of the mortgage proceedings a writ had been issued for the sale of the life interest in execution of a money decree. At the execution sale the life interest was purchased by the plaintiff, who completed his title by obtaining a Fiscal's transfer. Having obtained his Fiscal's transfer and before the added-defendant had com-

1. *3 Browne 82.*
2. *16 Ch. D. 544.*
3. *(1911) 14 N. L. R. 129.*
4. *(1907) 2 A. C. R. 19.*
5. *(1908) 10 N. L. R. 44.*

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pleted his title by a Fiscal's transfer, the plaintiff sued the defendant and the added-defendant for a declaration of title. The Commissioner has given judgment in favour of the plaintiff. He lays stress on the fact that the added-defendant did not obtain his Fiscal's transfer until after the institution of the present action, and he therefore entered judgment for the plaintiff, observing that the judgment will not bar the added-defendant from instituting another action, if he is so advised. Now, the result of this action is, in my opinion, almost absurd. Judgment has been given for the plaintiff, and it is admitted that all the added-defendant has to do, now that he has obtained his Fiscal's transfer, is to bring another action and obtain a reversal of those proceedings. I cannot believe that our system of procedure contemplates a position which is so manifestly unreasonable. It was contended that it was open to the added-defendant to prove the Fiscal's transfer obtained by him after the institution of the action, and that, having done this, he was in the same position as if he had obtained a transfer before action brought. In support of this argument I was referred to the case of *Carolis v. Perera*[1]. But I am of opinion that this decision does not support the argument of the respondent. The action in that case was a partition action, and in the judgment of Mr. Justice Grenier a distinction was drawn between an action for declaration of title and an action for partition. The judgment is carefully limited to partition actions, and it was held that, in actions of that description, a party was entitled to rely on a Fiscal's transfer obtained after action brought, on the ground that, if he was not allowed to do so, he would never have another opportunity of asserting his title. The true answer to the difficulty is, in the present case, I think, to be found in the position of the plaintiff who bought during the pendency of the mortgage proceedings. The right which he obtained was subject to the result of the mortgage action, and subject to the decree therein. The right which he obtained was, therefore, only a qualified right, and he was not entitled as against

1. *(1911) 14 N. L. R. 129.*

the purchaser in the mortgage decree to a declaration of title and an order of ejectment. In my opinion the judgment is erroneous, and the plaintiff's action must be dismissed against both the defendants with costs as regards the added-defendant here and in the Court below, and as regards the defendant in the Court below.

Set aside.

Proctors for appellants.—*W. H. W. Perera & C. A. Rodrigo.*

Proctor for respondent.—*C. E. A. Samarakkody.*

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SILVA *v.* ASOHAMY *et al.*

No. 19,230, C. R., Negombo.

Present: **Pereira, J.**

27th January, 1913.

Prescription—action to recover money advanced on a written agreement for hire and service—ordinance 22 of 1871, §§ 7, 8 and 11.

Where a sum of money was advanced by A to B, in consideration of which B entered into a written contract of hire and service with A for a term of years, and where it was stipulated that the sum of money advanced was to be deducted from the total amount of wages due, at the expiration of the term of the cootract,

Held, that the claim for the return of the money advanced falls under § 7 of ordinance 22 of 1871, and is prescribed in 6 years from the cause of action.

James Appu v. Cornelis de Silva[1], and *Thomassie v Kanaruthi*[2] differentiated.

In this case the plaintiff on the 12th January 1912 sued the defendants, who are the heirs of one Guneris Silva deceased, to recover from them a sum of Rs. 60 advanced to the said Guneris Silva on the 9th April, 1906, in consideration of which the said Guneris Silva entered into a written agree-

1. *7 S. C. C. 129.* 2. *5 S. C. C. 174*

Silva v Asohamy.

Pereira, J.

ment to peel cinnamon at Wester Seaton Estate for a period of three years from the said date, but in consequence of the plaintiff being dismissed from the said estate on the 7th October, 1907, the said Guneris Silva ceased to do work for the plaintiff as agreed from the said date. The defendants pleaded amongst other things that the plaintiff's claim was barred by prescription. They contended that the plaintiffs claim was prescribed in three years, but the Commissioner of Requests, after hearing argument, delivered his judgment in favour of the plaintiff on the 24th October, 1912, holding that the claim was on a written agreement and prescribed in six years from the date of the cause of action which he held arose on the 7th October, 1907.

A. St. V. Jayawardene with *L. H. de Alwis*, for the defendants-appellants.—The claim of the plaintiff is prescribed. The action is not to enforce any right or claim under the agreement. The advance was made not on the agreement but independently of it. The mere fact that reference is made to it in the agreement does not make it a term of the agreement. The cases of *James Appu v. Cornelia de Silva*[1] and *Thomassie v Kanavathi Pulle*[2] are exactly in point.

T. N. Mendis, for the plaintiff-respondent—The learned Commissioner is right. The claim is based on the written agreement and arises on it, and therefore falls under § 7 of the Prescription Ordinance. The case of *Sithravelu v. Sinnetamby*[3] supports this contention.

c. a. v.

Pereira, J. In this action two issues were framed but the defendants abandoned the first issue and relied on the second issue which raised the question whether the action was prescribed.

The plaintiff contended, and the learned Commissioner upheld his contention, that the action was brought under the

1. *7 S. C. C. 129.* 2. *5 S. C. C. 174.*
3. *(1905) 7 N. L. R. 379.*

Silva v. Asohamy.

Pereira, J.

written agreement P[1] and was therefore governed by § 7 of Ordinance 22 of 1871.

The defendants-appellants on the other hand contend that the action was one for a simple money debt and that the claim was prescribed in three years.

The plaint recites that the defendants' intestate entered into a written agreement with the plaintiff and received a sum of Rs. 60 as an advance. After reciting the death of the defendants' intestate, and that the defendants were the only heirs in possession of the property of the deceased it goes on to aver that there was due and owing from the defendants to the plaintiff as executors *de son tort* of the estate of the deceased the sum of Rs. 60.

Turning to the agreement P[1] it appears that the defendants' intestate entered into a contract of service with the plaintiff who was a kangany of the Wester Seaton Estate. By this agreement the plaintiff advanced a sum of Rs. 60 to the defendants' intestate, and the latter, in consideration of this sum and of the wages to be paid under the agreement, bound himself to serve the plaintiff as a peeler of cinnamon on the said estate. The agreement contained a stipulation that at the determination of the agreement the advances made by the plaintiff should be deducted from the total amount of wages due to the defendants' intestate.

It appears that the plaintiff was dismissed from the estate on the 7th October, 1907, and the agreement was thus brought to a close.

In my opinion the claim in the plaint is clearly laid under the agreement P[1]. It seeks to enforce an obligation which was created by that agreement.

Counsel for the defendants referred me to *Meddewatte James Appu v. Cornelis de Silva*[1] and to *Thommasie v.*

1, 7 S. C. C. 129.

Kanavathi Pille Murugasoe and another[1], but in my opinion these cases have no bearing on the question now under consideration. The latter case was one where a vendor sued the purchaser of land for the purchase money mentioned in the conveyance. It was there held that the action did not fall under § 7 of the ordinance but was a simple action for debt. In the former case the facts were practically the same.

Having regard to the claim as formulated in the plaint, I am clearly of opinion that the action is one on the written agreement P[1], and that the learned Commissioner was right in holding the claim is not prescribed.

The appeal is therefore dismissed with costs.

Dismissed.

Proctor for appellant.—*C. V. Siriwardene.*

Proctors for respondent.—*de Zoysa & Perera.*

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SEBASTIAN FERNANDO *v.* BERNARDO PERERA.

No. 19,796, C. R., Negombo.

Present: **Pereira, J,**

6th February, 1913.

Damages, action for—seizure of property without warrant or order from Court—is proof of malice necessary—false imprisonment—malicious arrest—malicious prosecution—injury to honour, reputation or feelings.

Where A caused a police constable to seize and take into custody a pair of cart wheels belonging to B, alleging that the same were stolen from him, and where B was unsuccessfully prosecuted for theft of the wheels and subsequently brought an action against A for recovery of damages consequent on the detention of the wheels, and also for damages incurred in connection with the criminal prosecution, but did not claim damages for injury to honour, reputation or feelings,

1. *5 S. C. C. 174.*

Fernando v. Perera.

Held, that he could maintain his claim for damages consequent on the detention of the cart wheels without averring or proving malice, but not the damage caused by reason of any action of the Police Court after the charge against him had been preferred to it.

Semble, that *Injuria*, in the more specific sense means any word or deed calculated to hurt the feelings of another or to injure him in his honour, dignity or reputation, and is not actionable unless the offending party can be said to have had the *animus injuriandi*.

Under the Roman Dutch Law proof of *animus injuriandi* is not necessary in an action where the damage claimed is limited to loss of property or of its temporary use or the temporary loss of liberty by reason of false prosecution.

Even under the English Law it is only in the event of an actual prosecution and not of mere information to the Police that malice need be averred and proved against the defendant.

Austin v. Dowling[1] followed.

de Alwis v. Murugappa Chetty[2] referred to.

In this case, the plaintiff says that the defendant caused the Police to seize and remove the wheels of a two wheeled cart belonging to the plaintiff, that subsequently the defendant charged the plaintiff before the Police Court with the theft of those two wheels, that the plaintiff was tried by the Police Court on the charge preferred by the defendant and acquitted, and that he (the plaintiff), by reason of these acts of the defendant, sustained damage which he now claims from the defendant. The damage claimed is not damage consequent on any injury to the plaintiff's honour, reputation, or feelings, but damage consequent on his being temporarily deprived of his property and on his being obliged to incur expense in connection with the litigation that ensued. The Commissioner of Requests dismissed the plaintiff's claim on the ground that he had not averred nor was he prepared to prove malice on the part of the defendant in acting as he did, and from this decision the plaintiff appealed. The plaintiff's counsel confined his claim to only so much damage as was sustained by the plaintiff by reason of the

1. (1870) 5 C. P. 540. 2. (1909) 12 N. L. R. 363.

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defendant's action in having the plaintiff's two wheels seized and detained by the Police, and did not press his claim to damages caused by reason of any action by the Police Court after the defendant had preferred to it his charge against the plaintiff.

Mahadeva, for plaintiff-appellant.—As the plaintiff is not claiming damages for malicious prosecution he need not aver or prove malice. The plaintiff's claim is to recover the damages he has sustained by reason of the wrongful seizure of his property at the instance of the defendant, and in such a case it is immaterial whether the seizure was malicious or not. He referred to *de Alwis v. Murugappa Chetty*[1] and *Austin v. Dowling*[2].

A. St. V. Jayawardene, for defendant-respondent.—The failure to allege malice is fatal to the plaintiff's claim. The seizure of the cart wheels by the Police at the instance of the plaintiff on the ground that they were stolen was the commencement of the prosecution of the plaintiff by the defendant. The wheels were seized by the Police under § 59 of the Police Ordinance and as the seizure was in consequence of a criminal charge, the principle laid down in *de Alwis v Murugappa Chetty*,[1] where the seizure was on a civil writ, does not apply. What the defendant did is similar to what is known to the Roman-Dutch Law as "malicious arrest". The Roman-Dutch Law draws a wide distinction between "false imprisonment" and "malicious arrest". [see Nathan vol. iii, paras 1648-1650.] *Austin v. Dowling*[2] is a case of false imprisonment and the reasoning there does not apply to this case.

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Pereira, J.—After setting out the facts as above, continued:—The question is whether the wrong committed by the defendant in moving the Police to act as mentioned above is actionable unless it can be shewn that the defendant was actuated by malice or evil intention. Now, a wrong or *injuria* is generally speaking an infringement of one's right to inviolability of person and property. In a more specific

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sense, it was applied to any word or deed calculated to hurt the feelings of another or to injure him in his honour, dignity or reputation. It is in this latter sense that the term "*Injuria*" is used by Voet in his title "De injuriis et famosis libellis" (see Voet 49-10-1), and although Voet in that title makes mention of the case of such injuries as the seizure and sale by one person of the goods of another who is not his debtor as if they were goods of his debtor (§ 7) it is clear that his treatment of such acts is limited to the consideration of that aspect of them that involves injury to one's honour, dignity, reputation or feelings. It is clear that in this sense *injuria* is not actionable unless the offending party can be said to have had the *animus injuriandi*, but I am not aware that *injuria* in the more general sense mentioned above is any the less actionable than *quasi*-delicts under the Roman Law because malice or evil intention cannot be attributed to the offender. Chief Justice Maasdorp in his work of Cape Law observes (Vol. III, p. 80) that in South Africa in the case of an action for malicious prosecution, the principles and practice in force in English Courts are followed, which, he says, are in entire accordance with the general principles of Roman- utch Law. I think the same may be said of Ceylon. One of the essential requisites of this form of action in England is proof that the defendant acted maliciously and without reasonable or probable cause. I am not sure that under the Roman Dutch Law proof of *animus injuriandi* can be said to be necessary in such an action where the damage claimed is limited to loss of property or of its temporary use or the temporary loss of liberty by reason of the false prosecution. No question on this point is involved in the present case, and I need not discuss it here; but it is clear that even under the English Law, it is only in the event of an actual prosecution and not of mere information to the Police that malice need be averred and proved against the defendant.

In *Austin v. Dowling*[1] Willes J. observed: "The distinc-

1. (1870) S. C. P. 540.

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"tion between false imprisonment and malicious prosecution "is well illustrated by the case where, parties being before "a Magistrate, one makes a charge against another, whereupon "the Magistrate orders the person charged to be taken into "custody and detained until the matter can be investigated. "The party making the charge is not liable to an action for "false imprisonment, because he does not set a ministerial "officer in motion, but a judicial officer. The opinion "and judgment of a judicial officer are interposed be- "tween the charge and the imprisonment. There is "therefore, at once a line drawn between the end of "the imprisonment by the ministerial officer and the com- "mencement of the proceedings before the judicial officer. "It is fallacious to inquire whether or not the one is "severable from the other until you find some inseparable "connection between them. It may very well happen in "the superior courts which have jurisdiction over both "descriptions of actions where a plaintiff, having been at once "before a Magistrate, may be content to bring his action for "false imprisonment only. In such a case the judge would "tell the jury to give damages for the false imprisonment "only, and not for what came under the cognizance of the "Magistrate".

In the present case, as in that cited, the information given by the defendant to the Police cannot be given the effect of a malicious prosecution. The same considerations do not apply to the two proceedings, and I do not think that malice or evil intent in the defendant need be established to entitle the plaintiff to damage for the seizure and detention of his two cart wheels by the Police at the instance of the defendant. The decision in *de Alwis v. Murugappa Chetty*[2] is, to some extent, in point. There, Hutchinson, C. J. observed—"If one seizes A's goods wrongfully and "without having any writ or warrant, he makes himself "liable to an action for damages. No evidence of malice is "necessary and it is no defence that he acted under a mistake.

2. *(1909) 12 N. L. R. 353.*

"Does it make any difference if he had a writ for the seizure "of B's goods or person, and by mistake seized A's ? On prin-"ciple I should say no".

I set aside the order appealed from and remit the case for the trial of the issue whether the defendant caused the Police to seize and remove the two wheels of the plaintiff's cart, and if so, what loss the plaintiff sustained, and such other relevant issues that the Court may think it necessary to frame on the cause of action mentioned above.

The plaintiff will have his costs so far in both Courts.

Set aside and sent back.

Proctors for appellant.—*de Silva & Perera.*

Proctor for respondent.—*L. C. E. Karunaratne.*

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SUMANASARA UNANSE *v.* SENEVIRATNE.

No. 4,774, D. C., Kalutara, (Int^y.)

Present: **Lascelles, C. J, & Ennis, J.**

6th September, 1912.

Postponement of case—costs of the day—order dismissing action in failure of payment before next date of trial—no jurisdiction.

A Court has no power to make an order that an action shall be dismissed in the event of the plaintiff's failing to deposit the defendant's costs of the day before the next day of trial.

The facts material to this appeal are set out in the judgment.

H. A. Jayewardene, for plaintiff-appellant.—The order allowing a postponement was wrong. The amendment suggested by the plaintiff did not introduce anything new that was not contemplated by the parties in their pleadings. The District Judge had no power to order the appellant's action to be dismissed in the event of his failure to deposit

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the respondent's costs before the next date of trial. The Code does not give him such a power. See *Rang Ettana v. Appu*[1] and *Goonewardene v. Monakulasuriya*[2].

J. Joseph for respondent.—This appeal is premature. The appellant might come to this Court when his action is finally dismissed for failure to pay costs. The order as it now stands is one for payment of costs and the Supreme Court will not interfere with the order unless it is manifestly wrong. (*Government Agent of Uva v. Banda*[3].) The appellant cannot be said to be prejudiced by the order as it now stands. If he pays the costs before the next date of trial his action will not be dismissed.

Lascelles, C. J.—In this case there was a discussion as to the issues that were to be fixed in the action, and at the close of the discussion Mr. V. M. Fernando, who appeared for the plaintiff, moved to amend his plaint. The amendment was allowed. Then Mr. de Saram, who appeared for the defendant, moved to amend his answer in order to meet the amended issue and applied to have the costs of the day; and he also asked for an order that the costs should be deposited in Court before the next day of trial. He gave his reasons for his application that the plaintiff was a Buddhist priest, and that, if the defendant succeeded, he would be unable to recover the costs from him. I think that Mr. de Abrew's forebodings were not entirely without ground as is shewn by the present appeal. The Judge then made order that, in the event of the defendant's taxed costs not being deposited in Court before the net day of trial, the plaintiff's action will be dismissed with costs. Against this order the plaintiff now appeals, and contends that the District Judge had no jurisdiction to make an order that the action would be dismissed in the event of the defendant failing to deposit the costs of the day before hearing. For the respondent it is pointed out that the appellant has been in a great hurry to bring this appeal; that he has cried out before he

1. (1899) 4 N. L. R. 185. 2. (1200) 1 Br. 21.
3. (1910) 13 N. L. R. 341.

Unanse v. Seneviratne.

Ennis, J.

has been hurt, and that no order has yet been made dismissing the action. However, we have been asked to decide on the question as to whether the District Judge had jurisdiction to make an order that he would dismiss the plaintiff's action after he failed to pay the costs in Court. No section of the Code has been cited to us which invests the District Judge with any such power, and I think that, in the case of an order finally dismissing the action, it is necessary that a Judge should act under some specific power given to him under the Code. We have been referred to the case of *Rang Etana v. Appu*[1]. Though the facts of that case are not exactly the same as the facts here, they are very similar. There the opinion of Mr. Justice Withers inclines to the view that in a similar case the District Judge had no power to dismiss the action. We, therefore, think that so much of the order as states that the action will be dismissed on failure to pay the costs into the Court must be expunged. In the circumstances of the case we do not propose to make any order as to the costs of the appeal.

Ennis, J.—I agree.

Proctor for appellant—*J. A. Fernando.*

Proctor for respondent—*A. de Abrew.*

1. (1899) 4 N. L. R. 185.

HUGO FERNANDO *v.* MIGEL APPU.

No. 19,371, C. R., Negombo.

Present :—**Lascelles, C. J.**

21st January, 1913.

Arbitration—arbitrator receiving fees from one party before award made—legal misconduct—bias—unconscious bias—proof of partiality not necessary.

It is legal misconduct for the arbitrator to receive his fees from one of the parties before the completion of his award.

Any act amounts to legal misconduct if it would give rise to a reasonable probability that the arbitrator would be subjected to any improper influence.

In order to constitute legal misconduct it is not necessary to prove dishonesty or partiality on the part of the arbitrator.

Bawa, K. C., for defendant-appellant.—The action of the arbitrator in accepting his fee from the plaintiff's proctor before making his award amounts to legal misconduct. The doctrine applicable to judges might well be applied to arbitrators viz.: "that, not only must they be not biassed, but that, even though it be demonstrated that they would not be biassed, they ought not to act as judges in a matter where the circumstances are such that people—not necessarily reasonable people, but many people—would suspect them of being biassed. [*Eckersley v. The Mersey Docks*[1].] The usual, and indeed, the proper course, that the arbitrator should have taken, was to have retained the award until his fees were paid. [Russell on Arbitration pp. 297 and 298]. There was no objection to the arbitrator taking his fees after the award was made.

A. St. V. Jayawardene, for plaintiff-respondent.—There is no misconduct on the part of the arbitrator. He was chosen by both the parties, and it is not suggested that the fact of the payment of his fees by the plaintiff's proctor did

1. *(1892) 2 Q. B. 667.*

influence the arbitrator in making his award. It is in evidence that the defendant's proctor advised the arbitrator to obtain his fees from the plaintiff in the first instance. It is the usual practice for the arbitrator to get his fees before making his award.

Lascelles, C. J.—This is an application to set aside an award on the ground of misconduct on the part of the arbitrator. The alleged misconduct consists in the fact that the arbitrator, before he made his award, accepted his fee which amounted to Rs. 21 from the plaintiff. There is, it is fair to notice, no imputation of dishonesty against the arbitrator; nor is it alleged or proved that he was in fact influenced in his award by the fee which he had received from one of the parties. But in order to constitute legal misconduct it is not necessary that there should be proof of any dishonesty or partiality on the part of the arbitrator. Any act amounts to legal misconduct if it would give rise to a reasonable probability that the arbitrator would be subjected to any improper influence. Now, the rights of an arbitrator as regards the payment of his fee are well settled. After making his award he is entitled to retain the award until he has received his fee either from one party or the other. But that is a wholly different matter from taking a fee from one of the parties before he has actually made his award. The receipt of a fee at that stage is, in my opinion, an act which is calculated to undermine the confidence of the opposing party in the impartiality of the arbitrator. There is one portion of the evidence of the arbitrator to which I ought to refer. The arbitrator in his evidence stated that the defendant's proctor had advised him to take his fee first from the plaintiff, and had stated that the defendant would not be responsible for his fee. If the meaning of that evidence is as I first thought, that the defendant's proctor had suggested that the arbitrator should take his fee from the plaintiff before he made his award, I should certainly have held that it did not lie in the mouth of the defendant to object to the award on the ground that the arbitrator had adopted a course which their own proctor had suggested. But Mr. Bawa has pointed out

that it is possible that the meaning of the advice given by the defendant's proctor was that, after the award had been made, that is, at the proper time when the fee ought to be paid, the arbitrator should take his fee from the plaintiff. This of course would be a perfectly unobjectionable proceeding, and it is perhaps the course which the defendant's proctor advised. I think it would be setting a very dangerous precedent if it were held that an arbitrator, before the completion of his award, was entitled to receive payment of his fee from either of the parties to the arbitration. The receipt of the fee at this stage of the arbitration in my opinion amounts to legal misconduct, and the appeal must be allowed and the award set aside. The appellant is entitled to the costs of the appeal, and to the costs of the application in the Court below.

Set aside and sent back.

Proctors for appellant—*de Silva & Perera.*

Proctors for respondent—*de Zoysa & Perera.*

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SELAMBRAM *et al.* v. PERUMAL *et al.*

No. 32,611, D., C., Colombo.

Present: **Lascelles. C. J. & Wood Renton, J.**

22nd November, 1912.

Last Will—fidei-commissum—"heirs in perpetuity"—sufficient indication of persons to be benefited.

A will contained the following words "I give and devise unto my two sisters ....the house and premises .... upon this condition however that they shall not sell mortgage or in any other manner alienate the said house and premises but that the same shall be always held and possessed by them and their *heirs in perpetuity* under the bond of *fidei-commissum.*

Held, that the above words created a valid *fidei-commissum* operating in favour of the heirs of the fiduciaries for four generations. The words "heirs in perpetuity" contain a sufficient indication of the class in whose favour the *fidei-commissum* is created.

Selambram *et al* v. Perumal *et al.*

Lascelles, C. J.

Lascelles, C. J.—The question on which this appeal turns is whether a valid *fidei-commissum* was created by the will of Gabriel Rodrigo Bastian Pulle, and if so what was the extent of the *fidei-commissum*, that is to say did the *fidei commissum*, assuming one to have been created, determine on the deaths of Ana and Maria, or did it continue to operate in favour of the heirs of these persons for the full period of four generations. The material words in the will are the following :

"I give and devise unto my two sisters Ana Rodrigo, a widow of Philip Morais and Maria Rodrigo the house and premises in which I am now residing, together with all the appurtenances thereunto belonging, marked No. 54, situated in the 4th Cross Street in the Pettah of Colombo upon this condition, however, that they shall not sell mortgage or in any other manner alienate the said house and premises, but that the same shall be always held and possessed by them and their heirs in perpetuity under the bond of *fidei-commissum*, and as regards my said two sisters it is my wish that they should live together amicably in the same house as they now do.

We have been referred, amongst other authorities, to the cases of *Tina v. Sadris*[1], *Paterson v. Silva*[2] (in which the correctness of the decision of the majority of the Court in the former case was questioned by Clarence, J.) *Lushington v. Samarasinghe*[3] and *Wijewardene v. Abdul Hamid*[4] and *Nugara v. Gonsal*[5] but in none of the cases do we find a concurrence of all the conditions which are present in the devise now under consideration, namely (1) the usual prohibition against alienation (2) the expressed intention of the Testator that the subject matter of the devise should be "held and possessed .... under the bond of *fidei-commissum*" and (3) the designation of the *fidei-commissum* as the "heirs in perpetuity" of the *fiduciarii* without the addition of any such words as executors, administrators and assigns.

1. *7 S. C. C. 135.*
2. *9 S. C. C. 33.*
3. *2 N. L. R. 295.*
4. *12 N. L R. 251.*
5. *14 N. L. R. 301.*

Selambram *et al.* v. Perumal *et al.*

Lascelles, C. J.

It is well settled that no particular formula of words is required to create a *fidei-commissum* and that the true test is the intention of the testator as evinced by the language of the instrument. The express reference to the "bond of fidei-commissum" places the intention of the testator beyond speculation. It is declared in express terms. It is true that there may be cases where the testator has made an express declaration of his intention to create a *fidei-commissum*, but his intention has been held to be incapable of execution for want of sufficient designation of the persons of the class in whose favour the *fidei-commissum* was intended to take effect. The South African case of *Drew v. Executor of Drew*[1] is an example. There the testators purported to "entail and burden with *fidei-commissum* the inheritances forthcoming to our aforesaid children under and by virtue of this will", but it was held that the children took the bequest absolutely as the will contained no gift over or mention of the persons who were to take after the children.

In the present case after the prohibition against alienation the clause in the will proceeds "but that the same shall be always held and possessed by them and their heirs in perpetuity under the bond of *fidei-commissum*".

Do the words contain a sufficient indication of the class in whose favour the fidei-commissum is created ?

The question is free from the difficulty which arises when the word "heirs" is followed by the words "executors and administrators" as in *Nugara v. Gonsal*[2] or by the words and "administrators" as in *Tina v. Sadris*[3].

We have to determine whether a devise which satisfies all the other requirements of a *fidei-commissum* fails to operate as a *fidei-commissum* because the persons who are to take after the original institutes are designated "their heirs in perpetuity".

1 *14 N. L. R. 301.* 2. *Buchanan's Rep. (1876) 203.* 3. *7 S. C. C. 135.*

In *Paterson v. Silva*[1] a very similar question was discussed and decided by Clarence, J. The testator by the third clause in the will, after prohibiting his children from alienating the property devised to them, declared that "they (*i.e.*, the testator's children) shall possess and leave the same to their heirs." Clarence, J., was of opinion that, if that clause stood alone, there could be no question but that the testator intended to create a *fidei-commissum* for the benefit of the heirs of his respective children, "meaning by heirs those persons who may be their heirs in ordinary parlance, that is to say, those persons who would be entitled to inherit their property under an intestacy".

This decision is a clear authority from the construction which seems to me to accord with the natural meaning of the language employed by the testator, namely that a *fidei-commissum* was created in favour of the persons who, under the law of intestate succession would be entitled to succeed to the property of the donees. The words "in perpetuity" plainly indicate the testator's intention that the *fidei-commissum* should endure for the benefit of these persons for the full period allowed by law.

I do not consider that *Tina v. Sadris*[2] is an authority against this construction of the will, as the judgments of the majority of the Court, specially that of Fleming, A.C.J., were considerably influenced by the fact that the prohibition against alienation extended to the heirs and administrators of the original donees.

For the above reasons I am of opinion that the will of Gabriel Rodrigo Bastian Pulle created, with reference to the house in question, a valid *fidei-commissum* for the full period allowed by law in favour of the persons who under the law of intestate succession would be entitled to succeed respectively to Ana and Maria.

This finding will necessitate the further inquiry on the

1. *9 S. C. C. 33.* 2. *7 S. C. C. 135.*

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issue of prescription in view of the proviso to Section 3 of the Ordinance No. 22 of 1871.

The case must therefore be remitted to the District Judge for further inquiry on the footing that the property is subject to a fidei-commissum of the nature which I have indicated. The appellant is entitled to the costs of his appeal from the 8th and 9th defendants and the other costs must be costs in the cause.

Wood Renton, J,—The material facts in this case are briefly these. The plaintiffs-appellants claim a declaration of title in themselves and in the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th respondents, who having declined to be co-plaintiffs have been made defendants in the action, to a house and premises described in a schedule to the plaint and the recovery of mesne profits and damages in lieu of current rent and profits till the ejectment, from the 8th and 9th defendants-respondents, who are in possession of the property. The original owner of the property, Gabriel Rodrigo Bastian Pulle, by his last will No. 1370, dated 17th April, 1845, devised it to his sisters, Ana Rodrigo and Maria Rodrigo. The devise was made subject to the following condition :—

> "They shall not sell, mortgage, or in any other "manner alienate the said house and premises, but the "same shall be always held and possessed by them "and their heirs in perpetuity under the bond of fidei "commissum, and as regards my said two sisters it is my "wish that they should live together amicably in the same "house as they now do".

The appellants and the 1st—7th defendants-respondents are the heirs of the devisees under this will. By deed No. 2434, dated 16th September, 1856, Ana and Maria Rodrigo gifted the property in question to the grand-daughter of the former, Agitha Morais, on the occasion of her marriage in community to Domingo Silva Pulle, subject, however, to the condition imposed on devisees under the will. The property was sold by the Fiscal in 1884, in execution against Domingo

Silva Pulle and has passed by various mesne conveyances to the 8th defendant-respondent, who has leased it to the 9th. Apart from the question of the effect of the condition, above quoted, in Bastian Pulle's will, the 8th defendant-respondent would admittedly have a prescriptive title to the property. An issue, framed on this point at the trial, has been answered by the learned District Judge in his favour. I do not think, however, that we can deal with that question on this appeal. Although the Appellant's Counsel admitted in argument at the trial that the 8th defendant and his predecessors in title had been in possession *ut dominus* since 1884, he cannot have intended to concede thereby that that possession sufficed to extinguish all the interests arising under Bastian Pulle's will—a concession immediately fatal to the appellant's case and rendering any consideration of the meaning of the condition in the will superfluous. Nor I do think that we ought—as the respondent's Counsel invited us—to take the allegations in the plaint and to try to see whether they afford material for upholding the finding of the learned District Judge on the issue of prescription. The only issues that we ought, in my opinion, to consider on this appeal are the 1st, 2nd, and 10th They have been framed as follows :—

(1) "Was a valid fidei-commissum created by the will "No. 1370 of 17th April, 1845?"

(2) "Was a valid fidei-commissum created by the Gift "Deed No. 2434 of 16th September, 1896?

(10) "Even if the will No. 1370 created a valid fidei-"commissum, was the fidei-commissum one in perpetuity or a fidei-commissum which elapsed on "the death of Ana and Maria"?

The District Judge answers: Issues 1 and 2 in the negative. On issue 10 he holds that, even if Bastian Pulle's will did create a fidei-commissum, that fidei-commissum lapsed on the death of Ana and Maria Rodrigo. On these findings and the finding on the issue of prescription the learned District Judge dismissed the appellant's action.

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It is unnecessary to consider the finding on Issue 2, since in my opinion Issue 1 should be answered in the affirmative, and on Issue 10 the decision should be that the fidei-commissum created by the will was one in perpetuity, so far as the law allows.

The view of the learned District Judge on Issue 1 may be stated thus—The will does not indicate with sufficient clearness the persons in whose favour the prohibition of alienation is introduced. The case of *Tina v. Sadris*[1] shows that the word "heirs" is too vague to create a valid fidei-commissum even if coupled with a prohibition of alienation. The respondent's Counsel pointed out in this connection that, in a later paragraph in the will Bastian Pulle describes Maria Rodrigo as his "heiress"—a term clearly meaning heiress by testamentary succession.

The ruling in *Tina v. Sadris*[1] that a deed in favour of A and his heirs without specifying who is to take the property on the death of the first grantee, created no fidei-commissum merely by reason of a prohibition of alienation having been inserted in the deed, was that of Lawrie J, alone. Fleming A. C. J, decided the case on the ground that the word "administrators", coupled with heirs "in the grant, made it impossible to say that it was the clear intention of the donor to create a fidei-commissum. Dias. J, dissented, and held that a valid fidei-commissum had been created. It is mainly in regard to the effect of such words in wills and grants, alleged to create fidei-commissa, as "Executors", "Administrators" and "Assigns", that *Tina v. Sadris*[1] has been supported by later decisions[2]. The trend of more recent authority, as the learned District Judge has himself shown, is against the *ratio decidendi* adopted by Lawrie. J.[3]

But the language of the condition that we have here to interpret differs so widely from the language of the condition

1. 7 S. C. C. 135. 2. (1911) 14 N. L. R. 301 and authorities there collected.
3. (1887) 9 S. C. C. 33; (1909) 1 Cur. L. R. 114.

Selambram *et al.* v. Perumal *et al.*

Wood Renton, J.

in *Tina vs. Sadris*[1] as to make the decision of Lawrie, J. in that case inapplicable, even if it were more in accordance with the authorities than it is. The words "in perpetuity" and "under the bond of fidei-commissum" leave no doubt in my mind that the testator intended to create a fidei-commissum and I think that he has used language sufficiently apt for that purpose.

The "heirs" indicated must be the heirs of the devisees *ab intestato*. In spite of the use of the term "heiress" in the will, in the sense above indicated, the manifest intention of the testator that the property should be kept in the family shows that it was in favour of heirs *ab intestato* that the fidei-commissum was created. I come now to Issue 10. The main point urged in favour of the contention that the fidei-commissum lapsed on the deaths of Ana and Maria Rodrigo was that they alone are expressly prohibited from alienating the property. But the provisions that the property is to be "always held and possessed" by "the heirs" "in perpetuity" "under the bond of fidei-commissum" appeared to me to show that the prohibition was meant to affect heirs also.

I would set aside the decree of the District Judge dismissing the appellant's action, declare that will No. 1370, dated 17th April 1845, created a valid fidei-commissum in favour of the heirs *ab intestato* of Ana and Maria Rodrigo for the full period allowed by law, and send the case back for trial and adjudication on that basis on the other issues. The 8th and 9th defendants should pay to the appellants their costs of this appeal. All other costs should be costs in the cause.

Set aside and sent back.

Proctor for appellant—*Vincent Ekanayake.*

Proctor for respondents—*Emmanuel Jayawardene.*

1. (1885) 7 S. C. C. 135.

SOURJAH *v.* UMUL FALEELA.

No. 427, M. C., Colombo.

Present: **Lascelles C. J., Wood Renton, & Pereira JJ.**

4th February, 1913.

Projections onstreets —prosecution for default of removal—bona-fide claim of right based on long possession—claim untenable—laws of prescription not applicable to roads—Municipal Councils Ordinance No. 6 of 1910, §157 and Road (Amendment) Ordinance No. 23 of 1910 § 6.

In a prosecution of the appellants under § 157 of the Municipal Councils Ordinance No. 6 of 1910, for having failed to remove within fourteen days of notice an alleged projection into the street, they set up a bona-fide claim of right to the projection based on long possession.

Held, that the provisions of §6 of the Road (Amendment) Ordinance, which enacted that the laws of prescription do not apply to roads, were fatal to the defence set up by the appellants.

E. W. Jayawardene for Appellants:—The Magistrate had no jurisdiction to try the case. We put forward a bona-fide claim of right to the projection and the matter should have been referred to a civil court.

[Pereira, J. Do you claim by right of 30 years' possession?]

Not merely by prescription but also and mainly by paper title.

[Pereira, J. 30 years' possession will not help you. Ordinance No. 23 of 1910 enacts that the laws of prescription do not apply to roads.]

We have title to the projection based on deeds.

[Lascelles, C. J. But you did not put forward that defence in the Lower Court, you did not produce any deed. The town plan shows that the steps are not yours.] The town plan is not conclusive proof of title in anybody. The projection is *prima facie* private property. (*Akbar v. SlemaLebbe*[1]).

1. *(1893) 2 C. L. R. 175.*

Sourjah v. Faleela.

Lascelles, C. J.

[Pereira, J. What is the date of that judgment?] 1893.

[Pereira, J. That was before the Evidence Ordinance. After the Ordinance such a presumption will not arise.]

Whether our claim might ultimately succeed or not in a Civil Court, we set it up *bona-fide*, and the Magistrate's jurisdiction is ousted (*Sourjah v. Mohamed*[1].)

[Wood Renton, J.—There is a difference between *bona-fides* and a *bona-fide* claim of right.]

Hayley, for respondent, not called upon.

Lascelles, C. J.—This is a case which was reserved for the opinion of the Full Court on a question of the construction of Section 157 of the Municipal Councils Ordinance 1910. The appellants, who are the owners of a building bearing assessment Nos. 53-55, Old Moor Street, were charged and convicted under the above mentioned section with having failed to remove within fourteen days of notice an alleged projection or encroachment into the street consisting of a masonry flight of steps in front of their house.

The argument for the appellants is that they, at the trial, set up a *bona-fide* claim of right which ousted the jurisdiction of the convicting Magistrate. The question which then arose, and which was reserved for the opinion of the Full Court, was whether such a defence was admissible in a prosecution under Section 157, inasmuch as the latter portion of the Section apparently enables the Council to take action with regard to projections and encroachments which have been made lawfully as well as with regard to those which have been made unlawfully.

At the argument our attention was directed to Section (90^b) added to "The Road Ordinance 1861" by Section 6 of "The Road (Amendment) Ordinance 1910", the effect of which is that the laws under which rights are acquired by right of possession or user do not apply to roads.

1. *2 L. L. R. 151.*

Sourjah v. Faleela.

Wood Renton, J.

The effect of this alteration in the law is fatal to the contention that the defendants set up a *bona-fide* claim of right, for the only claim of right which was seriously put forward was based on long possession which, under the amended law, could not found any claim to rights on a road.

It is true that where a claim is made *bona-fide* it is not the duty of a Magistrate to ascertain whether it is well founded, but it is well settled that the jurisdiction of the Magistrate is not ousted where it is clear on admitted facts that the law will not admit of the claim set up, where in other words the claim is impossible in law. (Vide *Arnold v. Morgan*[1] and *Coles vs. Miles*[2].)

In the present case the only ground set up was one which in law could not support the claim.

I am of opinion that the jurisdiction of the Magistrate was not ousted and that the appeal should be dismissed. In the circumstances of this particular case, and without laying down any rule as to payment of costs in appeals of this nature, I do not think that any order should be made as to costs.

Wood Renton, J.—There can be no doubt as to what our decision in this case must be. The Police Magistrate has found as facts, and the evidence warrants the finding, that the flight of steps in front of the appellant's house projects over the pavement and stands on a portion of the street. The only defence set up at the trial in the Municipal Court was a plea of prescriptive title. That is perfectly clear from the Record. But by § 6 of Ordinance No. 23 of 1910 the Legislature had declared that no person shall be entitled to any exclusive rights of ownership, possession, or user in respect of any portion of a road by reason of his having, whether before or after the Ordinance came into operation, had any possession or use thereof. The effect of this enactment is to exclude the sole defence relied upon at the trial.

1. (1911) 2 K. B. 322. 2. (1888) 57 L. J. M. C. 132.

Sourjah v. Faleela.

Pereira, J.

The appellant in his evidence, in reply to a question by the Court, said that he had not brought his deed with him. He did not say, however, that he had any deeds, and we may be quite sure that if he had been in a position to set up a paper title he would have done so at the proper time. In view of the provisions of § 6 of Ordinance No. 23 of 1910 it is unnecessary to consider the question of the appellant's *bona-fides*. *Bona-fides* in cases of this kind are not by itself sufficient to exclude the jurisdiction of the Police Magistrate. There must be a *bona-fide* claim of right. That is to say, the person charged must be in a position to allege what, if established, would be a good legal ground of defence. (See *Coles v. Miles*[1]; *Arnold v. Morgan*[2].) The appellant cannot do so here. I would dismiss the appeal.

Pereira, J.—It is clear that the new section (Section 90^b) added to "The Road Ordinance 1861" is fatal to the right set up by the appellant, and I agree that the appeal be dismissed without costs.

I may add that, in my opinion, the last proviso to Section 157 of "The Municipal Councils Ordinance 1910" does not apply to a case where a person establishes title or a right to a portion of ground claimed as part of a road, but is used by him as his own property. In that case there would be no encroachment on a road, or destruction of it, or projection over it. The proviso refers to such encroachments, obstructions, and projections, temporary or otherwise, on or over what is proved to be, or admittedly is, road, and made or erected lawfully, that is, for instance, with the sanction, where such sanction is duly provided for by law, of the proper local authority.

Proctor for Appellant—*N. H. M. Abdul Cader.*

Proctors for Respondent—*Julius & Creasy.*

1. *(1888) 57 L. J. M. C. 132.* 2. *(1911) 2 K. B. 322.*

RAN MENIKA *v.* MUDALIHAMY.

No. 11,017, C. R., Kegalle.

Present: **Lascelles, C. J.**

27th January, 1913.

Kandyan Law—acquired property of mother donated to children—succession to the children—bina marriage—contest between father and maternal grandmother—exception to the ordinary rule of inheritance—Sawer and Armour—which authority to be preferred.

A Kandyan woman, married in bina, donated during her lifetime all her acquired property to her two sons. The sons survived their mother, but predeceased their father and maternal grandmother. In a contest between the father and the grandmother as to the succession,

Held, that the property devolved on the maternal grandmother in preference to the father.

Per *Lascelles, C. J.*—This principle of Kandyan Law forms an exception to the general rule of inheritance. It is thus enunciated by Sawer : "The father is not the heir of the property of his children born in a "*bina* marriage, which they have acquired through their mother ; the "maternal uncles or next of kin on the mother's side being the heirs to "such property ; but the father will succeed to such children's property, "if otherwise acquired."

Where *Sawer* and *Armour* are in conflict *Sawer* is the preferent authority.

Appuhamy v. Dingiri Menika[1] followed.

Bawa, K. C., for the plaintiff-appellant. The property in question is "acquired" property.

The authorities as to the devolution of a woman's acquired property are collected in *Modder pp. 186 et seq. Sawer* gives two tables of succession, and it would appear that table B is the one to be followed in the case of acquired property. [See *Punchirala v. Punchi Menika*[2] ; *Mudalihamy v. Bandirala*[3].]

1. *9 S. C. C. 34.* 2. *2 S. C. C. 44.*
3. *3 N. L. R. 209,*

[Lascelles, C. J. Is there not a case more recent? *A. St. V. Jayawardene*,—Yes, *Dingiri Banda v. Kiribanda*[1]. Menika v. Mudalihamy.

In *Ukkuhamy v. Bala Etana*[2] the mother has been held to be the sole heir to a fatherless child.

In the case of *Ranhotia v. Bilinda*[3] it was held that where a person died childless and unmarried, his acquired property devolved on his father to the exclusion of his brother. A *fortiori* would a granduncle (on the mother's side) be excluded.

The decision in *Dingiri Banda v. Kiri Banda*[4] is not really in conflict with my contention. There the maternal uncle is preferred to the paternal half-brother.

The father is undoubtedly heir in respect of the child's acquired property [*Perera's Armour p. 88.*]

A. St. V. Jayawardene, for defendant-respondent. Here the father is a *bina* husband, and a distinction therefore arises. The rights of a *bina* husband differ from that of *diga* husband. [Vide *556, C. R., Kegalle 6,766, S. C. M. 22 Feb, 1906.*] The father married in bina is not the heir to the property of a child acquired from the mother but the property must go to relatives on the mother's side.

[Lascelles, C. J. Does that refer to property acquired in any particular way?]

No, to property acquired in any way.

The husband is not the heir to his wife's property.

The maternal relatives are preferred to the father of a woman dying intestate in respect of property acquired from her mother. [*Appuhamy v. Dingiri Menika*[5]]

Here, the mother made a gift of property in favour of her children with a life interest in favour of her husband

1. *(1911) 14 N. L. R. 510.*
2. *(1908) 11 N. L. R. 226.*
3. *(1909) 12 N. L. R. 111.*
4. *(1911) 14 N. L. R. 510.*
5. *9 S. C. C. 34.*

Menika v. Mudalihamy.

Lascelles, C. J.

and mother. If she had not gifted it would have become the property of her children and then the *bina* husband would have had no right. The principle of succession has been correctly laid down in *Dingiri Banda v. Kiri Banda*[1].

Bawa, K. C., in reply.

The case of *Appuhamy v. Dingiri Menika*[1] is not in point.

Lascelles, C. J.—This appeal raises a rather obscure point in the Kandyan Law of succession. The *propositi* are Punchi Banda and Punchiappuhami. The question is whether, on the death of these two persons intestate in the lifetime of their father Menikrala their property devolved on their father who is now represented by the plaintiff-appellant, or, as the learned Commissioner has held, on their maternal grandmother Dingiri Amma.

The first step in the inquiry is to ascertain the nature of the property, whether it is ancestral "paraveni" or acquired property. On this there is no room for doubt. The property, which consists of lands, was the acquired property of Punchi Menika, the mother of the *propositi*, and she donated it to the *popositi* reserving a life interest in half the land in favour of her husband and of her own mother Dingiri Amma.

The character of the property is thus not open to doubt (vide definition of the term *Lathimi* in Armour, chapter 6 § 1). It is in the technical language of the Kandyan Law "acquired" and not "ancestral" *paraveni* property. This being so the question at first sight would appear to be readily determinable by the tables given in the text books for the succession to acquired property. Two tables of succession are given in different editions of Sawers. Both are set out in Modder on pages 186 and 187. But in both cases on the death of the child intestate his acquired property goes (1) to the

1. 9 S. C. C. 34,

mother, and (2) to the father, (3) to brothers and sisters of the whole blood, (4) brothers and sisters uterine of the half blood. There is some difference between the two tables as regards the subsequent order of succession, but this is not material to the question under consideration.

Thus according to the general rules of succession the plaintiff, as representing the father of the *propositi*, their mother being dead, would appear to be entitled to succeed, and this was the view to which I was inclined at the close of the argument. Further consideration, however, has convinced me that this opinion is not right.

I have been referred, amongst other authorities, to *Ranhotia v. Bilinda*[1] and *Ukkuhhamy v. Baba et al*[2] ; but these cases are merely examples where the courts have followed the general rules of succession laid down in the text books for the devolution of acquired property on the death of a son or daughter intestate. They do not touch the point on which the Commissioner has decided the case.

The learned Commissioner bases his judgment on a principle of Kandyan Law which forms an exception to the general rule of inheritence. It is thus enunciated by Sawer (page 14) : "The father is not the heir of the property of his "children born in a *bina* marriage, which they have acquired "through their mother ; the maternal uncles or next of kin "on the mother's side being the heir to such property ; but "the father will succeed to such children's property if other-"wise acquired."

There can be no doubt with regard to this exception to the ordinary rule of inheritance. It is reproduced by Marshall (page 344) amongst the other rules of succession. (Vide also Modder page 165.) Nor can there be any doubt as to the applicability of this rule to the present case. The property here was clearly "acquired through their mother".

The appellant's case as shewn by paragraph 7 (iii.) of

1. *(1909) 12 N. L. R. 111.* 2. *(1908) 11 N. L. R. 226.*

Menika v. Mudalihamy.

Lascelles, C. J.

his petition of appeal is based on the authority of the following passage in Perera's Armour (p. 77): "But if the child "albeit the issue of a *bina* connection had remained under "the father's care after the mother's demise, in that case the "father will be entitled to a reversion of the child's estate "in preference to any child's distant maternal relations "(mother's granduncle's son, for instance) and that whether "the father was or was not also an *Ewessa* cousin of the said child's mother."

This apparent conflict between Sawer and Armour was discussed by the Collective Court in *Appuhami v. Dingiri Menika*[1] (which was a case of ancestral *paraveni* property), with the result that the opinion of Sawer was followed, and Sir Charles Marshall's view was followed.

Lawrie, J., in *C. R., Kurunegala 4944*[2] seems to have had some doubts as to the correctness of this decision. But the decision of the Collective Court on the relative values of the conflicting authorities is binding on me, and in any case I could not have held that the passage in Armour was applicable to the facts of the present case. As a matter of construction I should have held that it was applicable only to cases where claimants in the maternal line stood in a more remote degree of relationship to the *propositus* than that of great aunt.

For the above reasons I think the judgment of the learned Commissioner is right, and I dismiss the appeal with costs.

Appeal dismissed.

Proctor for appellant— *W. O. Herat.*

Proctor for respondent—*A. A. Wickremesinghe.*

1. 9 S. C. C. 34. 2. S. C. M. 30th May, 1898.

DE SILVA *v.* DE SILVA.

No. 33,358, D. C., Colombo.

Present: **Lascelles, C. J. & Wood Renton, J.**

7th February, 1913.

Informal lease—interest in land—can damages be claimed for breach of the lease.—Ordinance No. 7 of 1840—claim for use and occupation—recovery of advance—terms of informal agreement—how far admissible in evidence.

An action for damages cannot be maintained for the breach of the terms of an informal agreement of lease.

Per Wood Renton, J.—Where an informal agreement for a lease has been partly executed, the lessor is entitled to a reasonable sum in respect of the actual use and occupation of the premises demised to the lessee. In the same way where the lessee has not had the use and occupation of the premises demised in respect of which the lessor has received consideration there must be such a refund of the consideration as we have ordered to be made here. It will be open to either the lessor or the lessee for the purpose of such a claim based on use and occupation as I have just referred, to put in evidence the terms of the informal agreement itself.

Sampayo, K. C., for the appellant.

H. J. C. Pereira, for the respondent.

Lascelles, C. J.—The appeal raises a point which, in one form or other, has frequently occupied the attention of our Courts. The question involved in the appeal is as to the extent to which our Courts will relax the provisions of Ordinance No. 7 of 1840 on equitable grounds in cases where possession has been had under an informal agreement of lease. The facts of the present case are undisputed and very simple. The defendant, by an informal lease, purported to let a cinnamon plantation to the plaintiff for four years from the 5th of November, 1908. No question arises as to the first two years of the tenancy. The plaintiff paid the rent in advance and was allowed to take the produce of the estate. When it came to the third year, which expired on the 5th of March, 1911, the plaintiff, who had paid in advance the rent

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of Rs. 60, was disturbed in his occupation. Before he had harvested the cinnamon of that season the defendant had let the estate to a third party, and so the plaintiff entirely lost the harvest of that season. The plaintiff in his plaint claimed damages for the year 1911, and he also claimed that he might be given possession of the property for the following year or in the alternative that he should be awarded damages. The learned District Judge has awarded him damages in respect of the third year ending in November, 1911. The basis of that judgment is that the agreement, in the opinion of the learned District Judge, was not one of letting and hiring, but that the true nature was an obligation to deliver the crop of the cinnamon estate for a certain year at a specified rate; and on the authority of the case of *Wall & Co. v. Schraader*[1] the District Judge has awarded damages to the plaintiff. In my opinion the judgment cannot be supported on this ground. If reference is made to the informal agreement (P1) it will be found that it includes all the essential elements of a lease save that it is an informal document not executed before a Notary. Further, the claim of the plaintiff, as disclosed in his plaint, is laid on a lease. I am clearly of opinion that the transaction between the parties was not of letting and hiring, and that it was a transaction to which the provisions of Ordinance 7 of 1840 are applicable. Then the question arises as to how far the Court will interfere to relieve the plaintiff on equitable grounds. Numerous authorities on this question were exhaustively examined by Mr. de Sampayo, and I think that it is only necessary for me here to refer to two of them. The first is the well-known case of *Perera v. Fernando*[2]. There it was held that, where an occupier had been in possession under an informal lease, the owner of the land was able to recover against him for use and occupation. This is an authority which has been frequently followed, and is no doubt good law in Ceylon. But the question at issue here is an altogether different one. The claim of the plaintiff is for damages on the ground that he was interfered in

1. *Ram. '63-'68 p. 284.* 2. *Ram. '63-68 p. 83.*

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his occupation of the land in the third year. His claim amounts to this. He says: "I have an interest in the land for "that year. You have interfered with that interest, and, there-"fore, you are liable to pay me damages." But it is plain to me that, if the basis of his action is, as I understand it to be, a claim to an interest in land, his claim is bad because he cannot obtain such an interest without a notarial document in his favour. A very similar case was decided by the full Court in 1909. I refer to the case *Perera v. Amarasooriya*[1]. There an authority had been given to enter land and prospect for plumbago and to work the mines there. The authority had been informally given, and it was held that there was no right for damages for the breach of such an agreement. In that case it was clearly pointed out that the English doctrine of part performance had not been fully recognised in Ceylon, probably, I should think, because the terms of the Ceylon Ordinance are different from and more stringent than those of the English Statute of Frauds. The case to which I have referred appears to me to be a direct authority on the question under consideration. It is a judgment of the Collective Court, and is binding on us, and, if I may respectfully say so, I entirely agree with the reasoning on which that judgment is founded. It has been argued that the effect of the informal agreement is to place the plaintiff in a position of the tenant at will. It may be that it is so. But, as was pointed out in argument, if he is only a tenant at will he has surely no ground for claiming anything more than nominal damages for disturbance. It is not disputed that the plaintiff is entitled to a refund of the Rs. 60 which he has paid in respect of the year 1911. The judgment of the District Court will, therefore, be modified to the extent of entering damages only for the sum of Rs. 60.

With regard to the costs, the case, as far as the plaintiff is concerned, is a somewhat hard one, and we think that the fair order as to costs is that the plaintiff is to have his costs of his claim in the Court below on the scale applicable to a

1. *(1909) 12 N. L. R. 87.*

Silva v. Silva.

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claim of Rs. 60; that the order as to the claim in reconvention should stand, and that each side should pay their own costs of the appeal.

Wood Renton, J.—I entirely agree, and I will add a few words. The principle to be deduced from the decisions may be stated thus: Where an informal agreement for a lease has been partly executed, the lessor is entitled to a reasonable sum in respect of the actual use and occupation of the premises demised by the lessee. In the same way, where the lessee has not had the use and occupation of the premises demised in respect of which the lessor has received consideration, there must be such a refund of the consideration as we have ordered to be made here. It will be open to either the lessor or the lessee, for the purposes of such a claim based on use and occupation as I have just referred to, to put in evidence the terms of the informal agreement itself. But both the language of § 2 of Ordinance 7 of 1840 and the decision of this Court in *Perera v. Amarasooriya*[1] preclude the lessee from putting forward successfully on the basis of an informal agreement a claim to which effect can only be given on the ground that he has "an interest in the land". I felt strongly attracted during the argument yesterday by the view that perhaps the decision of the learned District Judge could be supported in its entirety on the ground of estoppel. It is clear that agreements, which are obnoxious to the provisions of § 3 of Ordinance 7 of 1840, while they are invalid, are not illegal, at least in the sense that they are prohibited by law: and there might perhaps be circumstances under which an estoppel might fairly arise. The appellant, in the present case, has had the advantage of the consideration for the lease, and has, in the conduct of her defence at the trial, relied on the informal agreement as a foundation for a claim for damages, and not merely for the purpose of showing what the terms of the actual use and occupation were. But it must be borne in mind, on the other hand, that this course was adopted only in her answer, and was so adopted

[1] *(1909) 12 N. L. R. 87.*

in the answer to a plaintiff, who was suing upon an informal as if it had been a valid lease, and was claiming that the appellant should be ejected from the premises, and should pay damages in the usual and ordinary sense of the term. Under these circumstances whether or not the plea of estoppel would be held to arise in other cases I do not think that effect can be given to it here. I agree that the appeal should be disposed of in the terms stated by my Lord.

Judgment modified.

Proctor for appellant—*E. W. Perera.*

Proctor for respondent—*C. A. de Silva.*

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DEONIS *v.* LABONIS.

No. 6,868, C. R., Matara.

Present: **Pereira, J.**

10th February, 1913.

Jurisdiction—Court of Requests—remainder of the term of the lease—damages for being kept out of possession before action—value of right involved.

Where the plaintiff alleged an ouster, and claimed a right of possession for the remainder of the term of a lease and also claimed damages for having been kept out of possession for the period before action,

Held, that the value of the plaintiff's right to possession must be calculated as for the full term of the lease, as the plaintiff can be awarded damages for the period before action only on the footing that he was denied possession on the lease.

The plaintiff instituted this action on a lease dated 11th August, 1911, due to commence from the 11th October, 1911, alleging that the 1st and 2nd defendants disputed the plaintiff's right to possession under the lease. He complained that on the 11th October, 1911, the defendants ousted him and had remained in the possession of the land to plaintiff's damage of Rs. 150. Plaintiff valued the remainder of the term of

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the lease at Rs. 250. The defendants contended that the Court of Requests had no jurisdiction. The Commissioner of Requests upheld the objection, holding that there were two independent substantive claims, and dismissed the plaintiff's action with costs.

Vernon Grenier, for the plaintiff-appellant.—The claim for damages is ancillary to the right of possession. The right of possession is worth Rs. 250. The Court of Requests has, therefore, jurisdiction. The principle laid down in *Cassim v. Sanhait*[1] would apply. The lessee's interest as stated in the plaint is confined to the remainder of the term of the lease. The value of that term alone decides that jurisdiction. (See *Silva v. Silva*[2]; *John Silva v. Julis Appu*[3].)

E. W. Jayawardene, for defendants-respondents.—This case differs from *Cassim v. Sanhait*[1] and the other cases. In those cases the value of the land was in dispute. Here the remainder of a term of a lease has to be valued. To that is added a distinctive claim for damages. In reality the value of the whole term of the lease has to be discovered. That value clearly exceeds Rs. 300. (See *Dingiri Hamy v. Horalala*[4]; *MacLachlal v. Maitlann*[5].) Wood Renton, J., decided *Cassim v. Sanhait*[1] with hesitation, and expressed that same hesitation in *Caro v. Arotis*[6].

The Court of Requests has no jurisdiction where the matter involved exceeds Rs. 300 in value. The principle underlying the Ordinance being that a Court of Requests, being a Court of inferior jurisdiction, is not authorised to deal with matters which even in the aggregate exceed Rs. 300 in value. The decisions as regards damages being ancillary (*Cassim v. Sanhait*[1], *&c.*) deserve re-consideration.

c. a. v.

Pereira, J.—It is not necessary that I should express my view of the point involved in the case of *Cassim v. San-*

1. *3 Bal. 20.*
2. *S. C. D. 62.*
3. *10 N. L. R. 351.*
4. *8 S. C. C. 121.*
5. *8 S. C. C. 138.*
6. *10 N. L. R. 173.*

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hait[1] cited in the course of the argument in appeal. The decision in that case has, in my opinion, no application to the present case. Under § 77 of the Courts Ordinance Courts of Requests have jurisdiction over actions in which the right to the possession of any land is in dispute, provided that the right or interest in dispute does not exceed Rs. 300. In the present case the right really in dispute is a right to possess a third of the lands referred to in the plaint from the 11th October, 1911, and the entirety of the lands from January, 1912, until the 11th October, 1913, because the averment in the plaint is that the defendant ousted the plaintiff from a third of the lands on the 11th October, 1911, and from the entirety of the lands in January, 1912. I say this, because, although the plaintiff claims to be declared entitled to the possession of the lands for the "remainder of the term of the lease", the question of the plaintiff's right to possession from the 11th October, 1911, is involved, and has to be decided by the Court, because it is only on the footing of that right that the plaintiff can be awarded the damage of Rs. 150 that he claims. That being so, the value of the right to possession from the 11th October, 1911, until the 11th October, 1913, has to be ascertained. The value of the right to the possession of the lands from 13th May, 1912, until the 11th October, 1910, has been assessed by the plaintiff himself at Rs. 250. On a calculation on that footing I find that the value of the right to possess during the whole period mentioned above would exceed the sum of Rs. 300. I therefore arrive at the same conclusion as that arrived at by the Commissioner, but for reasons different from those given by him.

Affirmed.

Proctors for appellant.—*G. E. & G. P. Keuneman.*

Proctor for respondent.—*David Samarawera.*

1. *3 Bal. 20.*

OMER *v.* FERNANDO.

No. 31,771, D. C., Colombo.

Present: **Lascelles, C. J. & Wood Renton, J.**

6th February, 1913.

Issue of writ—death of judgment-debtor—seizure and sale of property after death of judgment-debtor—legal representative not substituted as defendant of record—sale confirmed—are seizure and sale valid?—Civil Procedure Code §§ 341 and 344.

Where after the death of the judgment-debtor the judgment-creditor seized and sold in execution certain property belonging to the estate of the judgment-debtor without making the legal representative of the judgment-debtor a party on the record in terms of § 341 of the Code,

Held, that such seizure and sale were bad.

It is no answer that the sale was confirmed by the Court, inasmuch as the property was never brought within the jurisdiction of the Court by means of a lawful seizure, and the order confirming the sale was made under the mistaken belief that the Court had jurisdiction, which it, in fact, had not, to confirm the sale.

The facts appear in the judgment of Lascelles, C. J.

E. W. Jayewardene (with *Zoysa*) for the plaintiff-appellant.—There has been no application to set aside the sale. The present motion is to draw the money which is in Court. A separate action should have been brought to set aside the sale. The sale has been confirmed without objection, and it is too late to move in this very action to set aside the sale. The debtor died after writ issued, and it does not matter that the seizure was after his death. The principles laid down in *Malkarjun v. Narpari*[1] and *Sheo Prasad v. Hira Lal*[2] would apply.

It must be proved that damage resulted from the irregularity. (§ 282 Civil Procedure Code, and *Silva v. Dias*[3].)

Bartholomeusz, for substituted defendants-respondents.—

1. *I. L. R. 25 Bom. 337.* 2. *I. L. R. 12 All. 443.*
3. *(1910) 13 N. L. R. 125.*

All questions relating to execution should be determined in the same action, and not in a separate action. The seizure was bad, as the debtor was dead at the time. In any event, there was no application to set aside the sale, but only an objection to the withdrawal of the money.

E. W. Jayewardene in reply.

Lascelles, C. J.—This is an appeal from an order of the District Judge setting aside a judicial sale in the following circumstances. A writ was re-issued to recover the balance of the judgment debt; and on the 12th August, 1911, a land called Hitinawatte was seized, but before the date of seizure the judgment-debtor died. A sale was held on the 30th March, 1912, and confirmed on the 10th of June, presumably in ignorance of the death of the execution-debtor. On the 21st June, on the motion of the plaintiff's proctor, the administratrix and administrator of the judgment-debtor's estate were substituted on the record as defendants.

On the 2nd August the judgment-creditor's proctor moved to draw from the money in Court the balance due to his client. The substituted defendants were noticed, and also the purchaser; and the former showed cause against the judgment-creditor's motion. The learned District Judge held that the seizure and sale were bad, inasmuch as they took place after the death of the defendant and while there was no one on the record representing the estate of the deceased defendant. The sale was accordingly set aside and the amount of the purchase money in Court directed to be returned to the purchaser.

On appeal it was contended that the order setting aside the sale was bad, inasmuch as it was not made on any application for that purpose, and also on the ground that a judicial sale cannot be set aside on the ground of irregularity, however material, unless it is shewn that the applicant has sustained substantial injury.

With regard to the first point, it appears that when the substituted defendants appeared to show cause against the

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withdrawal of the money deposited in Court they specifically raised the contention that the sale was bad, and in effect applied that it should be set aside. In view of the attitude of the substituted defendants I am not disposed to attach much weight to the objection that the sale was set aside without formal application on that behalf. Neither do I think that it can be contended that the sale could not have been set aside without instituting an action for the purpose.

The question arising between the parties was for all practical purposes sufficiently formulated: it was a question "relating to the execution of the decree", and as such properly determinable under § 344 of the Civil Procedure Code by the Court executing the decree and not by separate action.

The decision of the Privy Council in *Malkarjun v. Narpari*[1] throws much light on the principles which are applicable to difficulties of this nature. The crucial question is, whether the sale was a nullity, a sale which the Court had no jurisdiction to make; or whether on the other hand it was merely irregular, so that the provisions of the Code with regard to irregularities in sales are applicable. It would appear that if the failure to apply under § 341 is no more than an irregularity, the present order cannot stand in the absence of evidence of substantial injury to the execution-debtor's estate.

If, however, the seizure amounted in law to a nullity, the property in question was never brought within the custody of the Court, and the subsequent sale was consequently void.

The answer to this question appears to me to turn on the construction of § 341 of the Procedure Code. The meaning of this section, as I understand it, is that if the decree-holder wishes to execute his decree against property which belonged to his judgment-debtor in his lifetime and which devolved on his representative at his death, he can do so only in the way indicated by the Code, namely, by applying

1. *I. L. R. 25 Bom. 337,*

to the Court to execute the decree against the legal representative. The principle appears to be clear. On the death of the judgment-debtor the *dominium* vests in his legal representative. The legal representative cannot be bound by proceedings to which he is not a party.

It has been held in India (vide *Sheo Prasad v. Hira Lal*[1]) that the corresponding Indian section (§ 234) applies only to cases where, at the death of the judgment-debtor, the property was not under attachment. It was considered that property under attachment must be considered as in the custody of the law, and that execution could issue against such property notwithstanding the death of the judgment-debtor after attachment. But this decision is no authority or the proposition that a valid seizure can be effected after the death of the judgment-debtor and at a time when no defendant is on the record, when the notice of seizure required by § 237 amounts to a notice of prohibition addressed to one who was no longer living.

I think it is clear that where the property has not been seized before the death of the judgment-debtor the legal representatives of the judgment-debtor are not bound by the sale. It is no answer that the sale in this case was confirmed by the Court, inasmuch as the property in question was never brought within the jurisdiction of the Court by means of a lawful seizure, and the order confirming the sale was made under the mistaken belief that the Court had jurisdiction, which it in fact had not, to confirm the sale. In my opinion the learned District Judge has come to a correct conclusion, and I would dismiss the appeal with costs.

Wood Renton, J.—I entirely agree.

Appeal dismissed.

Proctor for appellant.—*Geo. E. de Livera.*

Proctor for respondent.—*B. O. Dias.*

1. *I. L. R. 12 All. 443.*

WICKRAMARATNE *v.* DINGIRI BABA.

No. 1,230, D. C., Tangalle.

Present: **Wood Renton & Pereira, JJ.**

13th February, 1913.

Married woman—living apart from her husband under deed of separation—disposition of immovable property—is husband's written consent necessary?—Matrimonial Rights and Inheritance Ordinance 15 of 1876, § 9.

Under the Matrimonial Rights and Inheritance Ordinance No. 15 of 1876 a wife, though she may be living apart from her husband by consent under a deed of separation, cannot dispose of her immovable property except with the written consent of her husband. Such consent must be given with special reference to the property sought to be disposed of.

The facts of the case are set out in the judgments.

Bawa, K. C., A. S.-G. with *H. A. Jayawardene* for the plaintiff-appellant.

Wadsworth with *Drieberg* for the defendants-respondents.

c. a. v.

Wood Renton, J.—The plaintiff-appellant sues the defendants-respondents in this case for a declaration of title to, and for the ejectment of the respondents from, the field described in the plaint, and also for damages, which have been fixed by agreement at Rs. 100, for ouster. The plaintiff claims on a deed of conveyance No. 159, dated 20th March, and registered 25th March, 1912, from the owner—a woman Hin Hamy. The respondents also claim from Hin Hamy on a deed of transfer No. 7,513, dated 21st December, 1910, and registered on 6th January, 1911. Hin Hamy is a married woman, and was so at the date of the execution of her deed in favour of the respondents. The only serious question in the case is whether that deed was invalid as having been executed by her without her husband's consent. That it was

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executed without her husband's express consent is admitted. Hin Hamy was living at the time apart from her husband by consent under a deed of separation dated 3rd October, 1890. That deed contains a provision that neither of the two spouses nor their heirs shall be able by any law whatever to acquire a right to any movable or immovable property belonging to the other. The learned District Judge has held that this deed is in effect a renunciation by Hin Hamy's husband of any right to control the alienation of her property by her, and that it satisfies the requirements of § 9 of Ordinance No. 15 of 1876. The sale, therefore, by Hin Hamy to the respondents was valid, and by virtue of its prior registration defeats the conveyance in favour of the appellant. Although the District Judge holds that the appellant's purchase from Hin Hamy was a speculative one, he does not hold that it was fraudulent. The only question to be considered, therefore, is whether Hin Hamy's transfer in favour of the respondent is invalid.

I am unable to agree with the decision of the learned District Judge on this point. The deed of separation between Hin Hamy and her husband does not refer to the alienation of property at all. Hin Hamy in her sale to the respondents does not purport to be acting in pursuance of any consent contained in the deed of separation. Moreover, in my opinion the marital consent required by § 9 of Ordinance No. 15 of 1876 is a consent with special reference to the particular disposition, the validity of which is in question. This clearly results both from the letter and from the spirit of § 9 of Ordinance No. 15 of 1876. There is nothing contrary to it in the part of any judgment referred to by the learned District Judge in *Ponnammal v. Pattaye*[1]. I may quote in this connection the following passage :—

"I think that, in order to satisfy the provisions of "§ 9 of Ordinance No. 15 of 1876, there must be an ex-"press consent in writing by the husband prior to, or, "at any rate, contemporaneous with, the execution of

1. *(1910) 13 N. L. R. 291.*

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Pereira, J.

"the particular instrument involved, and having relation "to that instrument."

The separation of husband and wife by mutual consent does not release the wife from the necessity of obtaining her husband's consent or a judicial dispensation therefrom. (See *Silva Hamine v. Agonis Appuhamy*[1].)

The conduct of Hin Hamy was clearly fraudulent; and, as I have recently marked in another case, it is greatly to be regretted that there is no provision in the existing Penal Code which makes fraudulent duplicate transfers of property a criminal offence.

I would set aside the decree of the District Court and direct that judgment should be entered in favour of the plaintiff-appellant declaring him entitled to the premises in question, and directing the ejectment of the respondents therefrom. The respondents must pay to the appellant the agreed damages and the costs of the action and of the appeal.

Pereira, J.—Nanayakara Appuhamy and Hin Hamy were husband and wife married on the 6th October, 1888, that is to say, after the coming into operation of "The Matrimonial Rights and Inheritance Ordinance 1876". Hin Hamy, of her own right, was the owner of the field in claim. She, by her deed dated the 21st December, 1910, purported to sell and convey the field to the defendants. Her husband was no party to the deed. By her deed dated the 20th March, 1912, Hin Hamy sold and conveyed the same field to the plaintiff. Her husband, Nanayakara Appuhamy, was a party to this deed; that is to say, he thereby declared that he "fully agreed and gave consent" to the sale and conveyance by Hin Hamy of the field in claim, and duly signed the deed. The question is whether the defendants acquired any right or title to the field in claim by virtue of the deed in their favour of the 21st December, 1910. § 9 of "The Matri-

1. (1900) 4 N. L. R. 101.

monial Rights and Inheritance Ordinance 1876" provides that a married woman shall have full power of disposing of her own immovable property "by any act *inter vivos* with the written consent of her husband, but not otherwise". These words clearly mean that a married woman cannot dispose of her own immovable property by any means whatsoever except with the written consent of her husband; and I have no hesitation in saying that this provision implies that a disposition of immovable property by a married woman is ineffectual unless the consent of her husband is given to the disposition of the particular property dealt with at or before such disposition by means of a duly executed notarial instrument. This clearly is the combined effect of § 9 of Ordinance No. 15 of 1876 and § 2 of Ordinance No. 7 of 1840.

It has been said that in the present case the husband and wife had brought about a mutual separation *a mensa et thoro* by means of a notarial deed dated the 3rd October, 1890, and that by this deed power was given to the wife to dispose of her immovable property. I can see no such power given in the deed referred to; and even if there were any such power given, a general power of that kind, as may be inferred from what I have said already, is insufficient to entitle the wife to dispose of any particular property. Counsel for the respondent further argued that since the separation by means of the deed of 1890 it was open to the wife to as *feme sole* in disposing of her own property; but it is clear that even a judicial separation is not a dissolution of the marriage tie, and so long as the relation of husband and wife exists between two persons there is no reason for supposing that the provision of § 9 of Ordinance 1876 does not apply to them, especially in the face of the fact that where the consent of the husband is unreasonably withheld there is a remedy provided for by § 12 of the Ordinance. It was then said that under the Roman-Dutch Law a separation so far affected the marital power of the husband over the wife that the wife was at liberty to dispose of the property of the community without the intervention of the husband. This contention appears to have been expressly overruled in the case of *de Silva v.*

Wickramaratne v. Diugiri Baba.

Pereira, J.

Shaik Ali[1]. Anyway in the present case we have no concern with the incidents of marital power or community of property under the Roman-Dutch Law. We have to deal with the plain terms of an act of the Legislature which enacts that a married woman may dispose of her own immovable property with the written consent of her husband, "*but not otherwise*"; and in view of the words used, it is clear that, where the relation of husband and wife exists between two persons, the whole aim and object of the provision would be plainly defeated if it be not construed so as to imply that the wife's immovable property could not be alienated by her except in the manner indicated by it.

I would set aside the judgment appealed from and enter judgment for the plaintiff as prayed for with damages—Rs. 100—as agreed upon between the parties and costs.

Set aside.

Proctor for appellant.—*L. G. Poulier.*

Proctors for respondents.—*E. G. Auward & D. Wijesuriya.*

1. *1 N. L. R. 228.*

DRALLE v. EBRAMJEE.

No. 34,175, D. C., Colombo.

Present: **Lascelles, C. J. & Wood Renton, J.**

13th December, 1912.

Passing off—action to restrain—get-up of soap—colour and general appearance—whether silk-wrapping distinctive—evidence of user.

The plaintiffs, in an action for passing off, sold their soap in cardboard boxes of practically the same size, shape, and construction as the defendants. The plaintiffs' box bore on the lid, both outside and inside, a coloured label with the device of a lion leaping out of a bamboo jungle and the words "Lion Soap, George Dralle. Hamburg". The defendants' box bore on the lid, both outside and inside, a coloured label consisting of a representation of galloping race-horses with their jockeys together with the words "Finest Jockey Club Soap, Gottlieb Taussig, Soap Makers to the Imp. et Roy. Court, Vienna". The sides of the box were completely covered with labels representing race-horses. The defendants' cakes of soap were about the same size as the plaintiffs'. They were enclosed in red silk or satin wrappers of nearly the same shade, they were tied with the same gold-coloured cord, and they bore gold-coloured seals which bore a general resemblance to the seals set as the plaintiffs' soap though the impression on the seals was different. Both soaps were heavily scented. The defendants' cake of soap bore a conspicuous label similar to that on the box, and the plaintiffs' cake of soap bore this label equally conspicuously on each cake of the plaintiffs, and defendants' soap there was the device of the lion and of the horses and jockeys pasted over the red satin cover.

Held, that the plaintiffs were not entitled to an injunction.

Held further, (1) that the silk-wrapping was not distinctive of the get-up of the plaintiffs' soap.

(2) that as this was soap manufactured out of the Island, evidence of user outside Ceylon was admissible.

Per Lascelles, C. J.—In my opinion the plaintiffs' action fails. I arrive at this concluson on the broad ground that there is no proof that anyone was deceived into buying the defendants' soap for that of the plaintiffs, and that the defendants' soap is not calculated to deceive the public inasmuch as the difference between the two soaps is conspicuous and apparent to purchasers. No one, educated or uneducated, who took into his hand a cake of the "Jockey Club Soap" could believe that that soap was the "Lion Soap", if he had ever seen the "Lion Soap".

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Per Wood Renton, J.—Proof of instances of actual deception is, of course, not necessary in cases of this kind any more than proof of fraud; but where the alleged passing off consists in the adoption by one trader of an ordinary device, proof that it has actually been found to be deceptive is of considerable value.

The facts appear in the judgments.

F. M. de Saram (with him *de Sampayo, K. C., & Drieberg*) for the defendants-appellants.—The judgment in this case is clearly wrong The plaintiffs plead that their soap was known as silk-wrapped soap; but the evidence does not support this plea. The evidence shows that the soap was known as "Lion Soap". There was no plea nor was there any evidence that the combination of the red silk wrapper with the gilt cord and medal was distinctive of their soap or that the use of this get-up by the defendants was deceptive. It was incumbent on the plaintiffs to prove that those elements of the get-up on which they rely are distinctive. (See *Imperial Tobacco Co. v. Purnell*[1]; *J. B. Williams v. Bromley*[2]; *Jones v. Anglo-American Co.*[3]; *Coleman v. Stephen Smith*[4].) It has been held that absence of fraudulent intent will help the defendant; and the evidence of Mr. Zeisler in this case showed that it was not Gottlieb Taussig & Co. who copied the mark, and proof of 15 years user outside Ceylon of the get-up of the soap sold by the defendants was very material, and should have been considered by the learned Judge. Plaintiffs are seeking here to secure a monopoly of all silk wrappings for soap. It is submitted that no one can monopolise a manner of dressing up goods, especially if it has a legitimate value for the trade; and a trader who is merely the first to introduce a new class of get-up does not thereby secure it for himself. This was decided in "The Enamelled Coffee Tin Cases" (*Payton v. Snelling*[5]). The evidence adduced by the defendant proves that there are other varieties of soap sold in silk or satin wrappings.

1. *21 R. P. C. 598.* 3. *29 R. P. C. 361.*
2. *26 R. P. C. 481.* 4. *29 R. P. C. 81.*
5. *17 R. P. C. 48,628.*

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Bawa, K. C., A. S.-G. (with *Hayley*) for plaintiffs-respondents.—The plaintiffs' business according to the evidence was an extending and expanding one, while the volume of business of the soap manufactured by Gottlieb Taussig & Co. sold by the defendant was very limited; and it was not till after the plaintiffs' soap had acquired a reputation in the Ceylon market that the soap sold by the defendants became known to the trade. Evidence of user outside Ceylon is inadmissible, because the Ceylon market only should be considered, and the evidence here establishes the fact that the plaintiffs' soap was the first to be put on the market. The plaintiffs therefore having put their soap first on the Ceylon market they are entitled to prevent others from adopting the same get-up as theirs. Counsel referred to *Johnson v. Orr-Erwing*[1] ; *Re Munch's Application*[2]

F. M. de Saram in reply.

c. a. v.

Lascelles, C. J.—This is an appeal from a decree of the District Court of Colombo restraining the defendants from passing off soap not of the plaintiffs' manufacture as the plaintiffs' soap called "Lion Soap".

The plaintiffs, who are a firm of Hamburg soap manufacturers, introduced a soap known as "The Lion Soap" into the Ceylon market in 1906. The soap became popular, and from 1910 onwards considerable quantities were imported by one Adakappa Chetty, who had obtained the exclusive right of importing this article. In April, 1907, a representative of the firm of Gottlieb Taussig & Co., Soap Manufacturers of Vienna, introduced a soap called "Finest Jockey Club Soap". The importation of this soap, which was at first quite small, increased, until in 19 2 two hundred and fifty dozen cakes were imported.

The question on which the decision of this case turns is whether the get up of the "Jockey Club Soap" is such as to

1. (1882) *App. Cas.* 219. 2. 50 *L. T. R.* 12.

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induce the purchasing public to believe that Taussig & Co.'s "Jockey Club Soap" is the plaintiffs' "Lion Soap".

Both descriptions of soap are offered for sale to the public in cardboard boxes of practically the same size, shape, and construction. But as regards colour and general appearance there is no similarity between the two boxes. The plaintiffs' box bears on the lid, both outside and inside, a coloured label with the device of a lion leaping out of a bamboo jungle and the words "Lion Soap, George Dralle, Hamburg". With this exception the box is of a marbled brown colour.

The defendants' box bears on the lid, both inside and outside, a coloured label consisting of a representation of galloping race-horses with their jockeys together with the words "Finest Jockey Club Soap, Gottlieb Taussig, Soap Makers to the Imp. et Roy. Court, Vienna". The sides of the box are completely covered with labels representing racing scenes.

Thus the general appearance of the boxes is widely different, and no one to whom Providence had not entirely denied the faculty of observation could mistake the defendants' box for that of the plaintiffs. But the similarity on which the plaintiffs especially rely is with regard to the get-up of the cakes or tablets of soap. Each box contains two cakes of soap.

The defendants' cakes of soap, as compared with those of the plaintiffs', are about the same size, they are enclosed in red silk or satin wrappers of nearly the same shade, they are tied with the same gold-coloured cord, and they bear gold-coloured seals which bear a general resemblance to the seals set on the plaintiffs' soap though the impression on the seals is different. Both soaps are heavily scented.

On the other hand the defendants' cakes of soap bear a conspicuous label similar to that on the box, and the plaintiffs' cakes of soap bear their label equally conspicuously.

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But for the distinctive labels the resemblance between the two cakes of soap would have been very close; they would have been undistinguishable except by the impressions on the seals.

The case thus presents itself as one in which the goods sold by the defendants, though very similar as regards their general get-up to those manufactured and sold by the plaintiffs, are clearly distinguished from them by a conspicuous label. What are the legal principles by which cases of this description are determinable?

There is ample authority on the point; but I will refer to the case of *Payton & Co., Ltd. v. Snelling Lampard & Co, Ltd.*,[1] the facts of which are closely analogous to those now under consideration.

The defendants in that case sold their coffee in tins resembling in general appearance and colour those of the plaintiffs, but they were distinguished principally by the brand "Flag" on the back of the tins and the trade mark "Flag" in tricolour on the front of the tins.

The plaintiffs succeeded in a passing off action in the Court of first instance, but failed both in the Appeal Court and in the House of Lords.

In the Appeal Court, Lord Justice Romer made some observations which seem to me to be very much in point in the present case. "The evidence to my mind," His Lordship said, "shows really simply this. I think that the defend-"ants, when they were thinking of their new tins, had before "them one of the plaintiffs' tins, the blue amongst other tins; "and I have no doubt that they probably did look at the plain-"tiffs' blue tin with the other tins in order to see what class "of tin they might put upon the market, but that they would "be perfectly entitled to do. If a trader is going to put a "special tin on the market, he is entitled to look at his neigh-"bour's goods for the purpose of seeing what is the most

1. *17 R. P. C. 48,628.*

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"attractive form, what is the best form likely to attract custom-"ers, so long as he takes care to distinguish his goods from "the prior goods." This it was held, the defendants had effectually done by distinguishing their tins with the "Flag". In the House of Lords Lord MacNaghten emphasised the fact that the plaintiffs' tins were distinctly labelled "Royal Coffee" and the defendants' tins were distinctly labelled "Flag Coffee", and his judgment was based principally, if not entirely on this distinction.

In one respect the plaintiffs' case here is less strong than that of the plaintiffs in the case to which I have referred.

It is clear that Gottlieb Taussig & Co. did not deliberately copy the get-up of the plaintiffs' soap for the purpose of capturing the Ceylon market; for Mr. Zeisler, the travelling agent of the firm, proved that he had sold large quantities of Jockey Club Soap in exactly the same get-up since 1902, and his evidence was fully confirmed by the production of a certified copy of the registration of the soap in question in 1902 and the catalogue of the firm dated 1904, in which the soap, in its present get-up, is clearly depicted.

The evidence of foreign user was objected to; but I think that this evidence is clearly admissible in answer to the allegation of fraudulent invitation in paragraphs 6 and 7 of the plaint.

Neither do I see how this evidence could be regarded as irrelevant on the question of what part of the get-up of the goods is common to the trade if that point had been put in issue inasmuch as the trade in Ceylon in this description of soap is a trade in goods manufactured outside the Island.

It is true that in considering the distinctive effect of the labels, regard must be had to the market in which soap is sold.

But it is incredible that there is any class of purchasers in Ceylon to whose eyes a coloured badge of a lion would not appear a distinctive mark. This coloured representation

of a wild beast is the kind of mark which I should have thought would have particularly arrested the attention of the uneducated classes amongst whom this soap is said to be largely sold.

There is no direct evidence that any purchaser has been deceived into buying the defendants' soap for that of the plaintiffs', and I do not see how any purchaser could go into the box and depose that he had mistaken the defendants' soap for that of the plaintiffs'. He would at once be confronted with the conspicuous difference between the labels.

The plaintiffs endeavoured to prove that their soap had acquired a special reputation in the market as "silk-wrapped" soap; but the evidence adduced for this purpose, besides being contradictory, strikes me as artificial and unconvincing.

Vytalingam, for example, the plaintiffs' attorney, stated that he never heard the "Lion Soap" called "Silk Soap", that uneducated people would call the soap "Lion Soap". Abdul Careem, a retail dealer, also called for the plaintiffs, said that his uneducated customers would call the soap "Lion Soap" "on account of the picture". He went on to say: "I think that if I gave a man who does not talk English "a cake of 'Jockey Club Soap' when he asked for 'Lion "Soap,' he would refuse it."

The soap may have been sometimes described as "silk wrapped", but I am not satisfied that it acquired any local reputation under that designation; and in view of the evidence of the use of silk wrappers on other soaps, I certainly am not prepared to hold that the silk wrappers is distinctive of the plaintiffs' soap.

In my opinion the plaintiffs' action fails. I arrive at this conclusion on the broad ground that there is no proof that anyone was deceived into buying the defendants' soap for that of the plaintiffs', and that the defendant's soap is not calculated to deceive the public inasmuch as the difference between the two soaps is conspicuous and apparent to purchasers. No one, educated or uneducated, who took into his

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hand a cake of the "Jockey Club Soap" could believe that that soap was the "Lion Soap" if he had even seen the "Lion Soap".

I would set aside the judgment and dismiss the plaintiffs' action with costs here and in the Court below.

Wood Renton, J.—The plaintiffs-respondents, a firm carrying on business in partnership under the name of George Dralle in Hamburg, by their attorney A. Vaitalingam of Colombo, sued the defendants-appellants, the agent in Colombo of Messrs Gottlieb Taussig & Co., of Vienna, in this action for an injunction restraining him from infringing the respondents' trade mark in respect of soap and from passing off soap manufactured by Messrs. Gottlieb Taussig & Co. as and for soap of the respondents. The respondents also claimed an accounting and the delivery up of all boxes of the infringing soap in the appellants' possession. The case stands now in narrower ground than it did upon the pleadings. The respondents' registered trade mark consists only of a label with the device upon it of a lion rampant. The trade mark of Gottlieb Taussig & Co. consists of a representation of a number of jockeys on horseback. It was obvious that the latter trade mark could not be an infringement of the former, and that head of the respondents' claim was properly withdrawn when the issues were framed. The claim to an accounting was also waived in the course of the proceedings. The only questions with which we are now concerned are, therefore, the claim for passing off; and if that should be established, the consequential claim for the delivery up of the infringing articles.

The respondents' soap is sold in small boxes of the same size, each containing two cakes. Each cake is wrapped in red satin, is bound with gold thread, and has a gold paper seal on the back and a coloured paper label with the registered device of the lion rampant in front. The same device appears on the outside and within the lid of each box. The two cakes of soap are covered by paper advertisements. The soap is highly scented. The respondents' attorney, Vaita-

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lingam, stated in his evidence that what he claimed chiefly was the red satin wrapping. "I have no objection," he said, "to soap wrapped in silk of a different colour. I also claim "the gold thread and seal in combination with the red satin "wrapping." In the plaint, however, reference is made to the boxes containing the cakes of soap, and the respondents' counsel relied on the entire get-up as being distinctive of their goods. There is a considerable superficial resemblance between the respondents' boxes and those in which the soap of Messrs. Gottlieb Taussig & Co. are packed; but apart altogether from the fact that the respondents' attorney practically limited his claim in his evidence to the wrappings of the soap itself, I do not think that any purchaser could have been so unwary as to mistake Messrs. Gottlieb Taussig & Co.'s boxes for those of the respondents. It was suggested in argument that such a mistake might be made, if not by the ratail trader, at any rate by villagers, who are ignorant of the English language. Villagers in this country, whether they are Singhalese or Tamil, do not make their purchases hurriedly. For the most part they see that they get what they want; and no villager, however ignorant he may be of the English language, can be deceived into mistaking a horse for a lion. The important question, however, is, whether the get-up of Messrs. Gottlieb Taussig & Co.'s cakes of soap so nearly resembles that of the respondents' soap as to be calculated to mislead unwary purchasers into taking one for the other. The learned District Judge has answered this question in the affirmative, and has given the respondents the injunction that they claim. Numerous cases were cited to us in the course of the argument; but the question is mainly one of fact. Mr. Zeisler, the travelling agent of Messrs. Gottlieb Taussig & Co., stated that when he joined the firm in 1901 the soap with which we are here concerned and which is called Jockey Club Soap was already got-up in exactly the same way as it is now. The respondents' counsel objected to this evidence, and the learned District Judge reserved his order upon it. In my opinion the evidence was admissible in view of the fact that the respondents' plaint contains an allegation

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of fraud. We start, therefore, with evidence that the get-up of Gottlieb Taussig & Co.'s soap was one adopted by them *bona fide* long prior to the proceedings in the present case. If it had not been for the fact that each cake of the respondents' soap bears their registered device, while each cake of Gottlieb Taussig & Co.'s soap is wrapped in thin cover label, I should have been disposed to regard the latter as likely to be mistaken for the former; and as the respondents were admittedly first in the local market, they would have been entitled to the redress which the District Judge has given them. The soap of Gottlieb Taussig & Co., like that of the respondents', is wrapped in red satin, is bound by gold thread, and has a gold seal at the back of each cake, although the real is darker in colour than that used by the respondents. The soap of Gottlieb Taussig & Co. has also a scent strongly resembling the scent of the respondents' soap. Here, however, as in the case of the boxes, the entirely distinctive characters of the labels affixed to the two kinds of soap make it impossible for me to hold that the one could have been mistaken for the other. (See *Payton v. Snelling Lampard & Co. Ltd.*[1] No instances of actual deception have been proved, except one spoken to by a witness Thawfeek, who gave the following evidence :—

> "A man came to me once and asked for Lion Soap—"he would not pay my price—he went away and came "back and showed me a piece of Jockey Club Soap and "said he had bought it for less. I then said it was not "Lion Soap. The man went back with the soap. That "took place three months ago. I did not tell Vaita-"lingam this."

Proof of instances of actual deception is, of course, not necessary in cases of this kind any more than proof of fraud; but where the alleged passing off consists in the adoption by one trader of an ordinary devise, proof that it has actually been found to be deceptive is of considerable value. Thawfeek's evidence is discounted to a large extent by the fact that the man of whom he speaks was not himself called as a

1. (1900) 17 R. P. C. 48, 628.

witness. The respondents' case was that, although their soap is known as the Lion Brand, it was spoken of by illiterate villagers as silk-wrapped soap, and that consequently Gottlieb Taussig & Co.'s soap was easily mistaken for it. Evidence to that effect was given by the witness Sittampalam. In cross-examination, however, he said :—

> "Dralle had a large number of samples, all got-up "in a different way. Some wrapped in tissue paper, "some in glazed paper, some in thick paper. The Lion "Soap was the only soap wrapped in silk. The traders "spoke of the Lion Soap as silk-wrapped soap to distin-"guish it from the other samples."

It would appear from this evidence that the Lion Soap was called silk-wrapped soap to distinguish it from other samples belonging to the respondents. Vaitalingam, the respondents' attorney, also stated that the Lion Soap had attained a general reputation in the market as silk-wrapped soap under the Tamil equivalent for these words—"patu sankiri". But he admitted that he knew nothing of the retail trade; and one portion of his evidence seems to me to be of importance. Speaking of Adakappa Chetty he said :—

> "He obtained an exclusive agency for the sale of "the soap in 1911. Adakappa Chetty told me that if "the Jockey Club Soap came into the market it would "prejudice the sale of the Lion Soap. He told me "that in 1911.........I sold the soap at 12 shillings a dozen "boxes. I know the retail price of it is Rs. 14·50 per "dozen boxes. Jockey Club Soap is sold at Rs. 11·50 "a dozen boxes."

I am inclined to think that these passages throw a considerable light both on the origin of these proceedings and on the reason why the Jockey Club Soap has interfered with the respondents' sales. Vaitalingam also said that uneducated people would have known the soap as the Lion Soap. Abdul Careem, another witness for the respondents, while he said that sometimes people used to come and ask for Lion

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Soap, gave other evidence of a character strongly adverse to the respondents' claim. I may cite the following passages :—

> "I am a retail vendor. The majority of my custom-"ers are unable to read English. Those who could not "read English called the Lion Soap, whether they could "speak English or not.."
>
> "Hawkers, Parawas, Sinhalese, Moormen used to "ask for the soap as Lion Soap. My uneducated "customers called the soap Lion Soap. I think that if "I gave a man who does not talk English a cake of "Jockey Club Soap when he asked for Lion Soap he "would refuse it."

Meera Lebbe said that if a customer asked for silk-wrapped soap he gave him Lion Soap before Jockey Club Soap came out, and added : "Now I give customers one or the other." Sangarayer, clerk and manager of Adakappa Chetty, said that ordinary customers who do not understond English call the Lion Brand of soap silk-wrapped soap. He added, however, that even if a man could not read he would be able to distinguish the Lion.

I do not think that this evidence is sufficient to show that the respondents' soap was generally known in the market as silk-wrapped soap. Admittedly, wholesale traders spoke of it as Lion Soap, and the respondents' own witnesses show that a considerable proportion of the retail dealers distinguished it by the figure of the Lion, and not by its satin wrapping.

In view of these circumstances and of the marked differences between the labels affixed to the soap of the respondents and that of Messrs. Gottlieb Taussig & Co. I think that the respondents are not entitled to succeed in this action. I would set aside the decree of the District Court and dismiss their action with all costs of the action and of the appeal.

Appeal allowed.

Proctors for appellant.—*de Vos & Gratiaen.*

Proctor for respondent.—*P. G. Cooke.*

GOONEWARDENE *v.* GOONEWARDENE.

No. 7,334, C. R., Galle.

Present: **Wood Renton. J.**

20th February, 1913.

Co-owner—right of co-owner to build—consent of other co-owners—where consent withheld—remedy—partition action—exceptions.

One co-owner cannot build on a land held in common without the consent of the other co-owners, unless the land was acquired, or at least held, by the co-owners as a building site.

Where such consent is withheld the remedy of a co-owner is to institute a partition action.

The law does not prohibit one co-owner from the use and enjoyment of the property in such manner as is natural and necessary under the circumstances.

Silva v. Silva[1] and *Siyadoris v. Hendrick*[2] referred to.

A. St. V. Jayewardene for the defendants-appellants.—The judgment of the Commissioner is wrong. There is strong proof that the land in question has been used by several of co-owners for the purpose of building on it, and there are at present six houses on it. Hence it must be taken that by tacit consent of all the owners the land has been converted into a building block. The defendants were entitled to build without the permission of the other owners. (*Siyadoris v. Hendrick*[1]; *Silva v. Silva*[2].)

de Zoysa, for the plaintiff-respondent, was not called upon.

Wood Renton, J.—In spite of Mr. A. St. V. Jayewardene's clear and strenuous argument in support of the appeal, the decision of the Commissioner of Requests appears to be correct. There is no doubt but that by the common law of this Colony one co-owner cannot build a house on a land held in common without the consent of the other co-owners. Where such consent is withheld a co-owner is not without a remedy. He can institute an action for partition. There is,

1. 6 N. L. R. 225. 2. 6 N. L. R. 275.

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however, a class of exceptions to the general principle which I have just stated. It is defined by Sir Charles Layard, in *Silva v. Silva*[1], and by Sir John Bonser, in *Siyadoris v. Hendrick*[2]. These decisions stand by their own authority, but they have constantly been followed in later cases. The class of exceptions referred to may be defined in this way. The law does not prohibit one co-owner from the use and enjoyment of the property in such manner as is natural and necessary under the circumstances. For example, as in *Siyadoris v. Hendrick*[2] the land had been purchased for the express purpose of digging plumbago contained in it, it would have been unreasonable that any co-owners should have been prohibited from digging for plumbago without the consent of the other co-owners. Sir Charles Layard gives another illustration in *Silva v. Silva*[1]. If the land were fit for paddy, it could scarcely be contended that any one co-owner would be entitled to prevent the other co-owners from cultivating it in that way. Mr. A. St. V. Jayewardene suggested that this was land acquired, or at least held, by the co-owners as a building site. If the evidence established that suggestion, the case would clearly come within the class of exceptions which I have just stated. But the evidence shews only that certain houses had been built on the land by consent. There is no instance in which any house had been erected without the consent of the other co-owners. A former co-owner had commenced to build a house, but the others interposed, and the building never got beyond its foundations. I am unable to hold on the evidence that any special character attached to this land of such a kind as to relieve the appellant from the ordinary fetter imposed upon the rights of co-owners by the the common law.

The appeal is dismissed with costs.

Appeal dismissed.

Proctor for appellant—*Henry Gooneratne.*

Proctor for respondent—*C. W. W. Kannangara.*

1. 6 N. L. R. 275. 2. 6 N. L. R. 225.

DON ADRIAN v. NICHOLAS APPUHAMY.

No. 11,212, D. C., Galle.

Present: **Pereira & Ennis, JJ.**

21st February, 1913.

Action for malicious prosecution—Police Magistrate refusing summons having gone through preliminaries—accused not before Court—no prosecution—action does not lie—action for injury caused by proceedings before prosecution—nature of evidence necessary.

An action for malicious prosecution does not lie where the Police Magistrate, having gone through the preliminaries required by the Code, refuses summons on the accused.

In order that the proceedings may constitute a prosecution the accused should be before the Court.

In an action for damages for injury caused by proceedings before prosecution the amount of evidence required to prove that the plaintiff was innocent would be much greater than in a case of malicious prosecution, in which case the order of the Criminal Court discharging him coupled with a denial on oath that he committed the offence would create a strong presumption in his favour.

E. W. Jayewardene, for the plaintiff-appellant, contended that judgment ought to have been entered for the plaintiff. He has been acquitted by the Magistrate, and that is strong evidence of his innocence. Further, the plaintiff has himself given evidence stating the charge to be false. There is strong proof of malice. When a criminal charge has failed it is incumbent on the defendant in an action for malicious prosecution to justify the prosecution. (*De Villiers, De Injuriis (Voet) p. 145 ; Corea v. Peiris*[1].)

A. St. V. Jayewardene for the defendant-respondent.—The acquittal of the plaintiff could only be used to prove that the criminal proceedings terminated in his favour. His acquittal is no proof of his innocence, That must be established in these proceedings. [*Ennis, J.* Does not the acquittal prove that the accused was innocent ?] No, the acquittal

1. 9 N. L. R. 279.

Adrian v. Nicholas.

Pereira, J.

may have been due to various causes and not to the falsity of the charge. [*Pereira, J.* In such a case would not very little evidence be sufficient to prove that the charge was false? Here there is the plaintiff's oath.] No, the plaintiff must prove his innocence conclusively in this case. He cannot say that his acquittal has established his innocence. That is the law in Ceylon. Lascelles, C. J., in *Corea v. Peiris (ubi supra)* said that the law laid down in *de Villiers, De Injuriis p. 145*, was not applicable to Ceylon (See also *Sado et al. v. Nona Baba et al.*[1]; *Moss v. Wilson*[2]). But in this case the plaintiff was never acquitted. No process was ever issued against him, and he never appeared in Court as an accused. There was, in short, no prosecution of the plaintiff by the defendant. This principle was upheld in *Kopal Khan Jan v. Bholanath Khettry*[3]. There being no acquittal the plaintiff's action must fail.

E. W. Jayewardene in reply.—The Indian case relied on does not apply. Here the defendant charged the plaintiff to the Police, who reported the matter to the Court. The defendant then finding that he was unable to substantiate his false charge saw that his witnesses would not support his case; whereupon the Police Magistrate refused to issue process. That was a sufficient prosecution to entitle plaintiff to maintain the action. Even if there had been no prosecution the plaintiff had been falsely charged, and he is entitled to claim damages. [*Pereira, J.* In that case the plaintiff has no order of acquittal to rely on, and he must establish his innocence conclusively in the proceedings]. Even if that be the case the plaintiff has done so.

c. a. v.

Pereira, J.—The first issue in this case is, "Did the "plaintiff cause hurt to the 1st defendant with a knife?" If this is to be considered to be an action for damages for malicious prosecution the burden on this issue would rest comparatively lightly on the plaintiff. That is to say, a strong

1. *11 N. L. R. 162.* 2. *8 N. L. R. 368.*
3. *I. L. R. 30 Cal. 880.*

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presumption would arise in his favour on his producing the order of the Criminal Court discharging him, and on his making oath himself that he did not cause hurt. The plaintiff gave evidence on oath, and also produced the order in his favour made in the criminal case. The defendant thereupon gave evidence himself, and, on a consideration of all the evidence led, the District Judge was of opinion that its weight was on the side of the defendant. In other words he held that the plaintiff had failed to prove that he had not caused hurt to the defendant. I have read the evidence, and I am not prepared to say that the District Judge arrived at a wrong conclusion. It has been contended by counsel for the respondent that the proceeding in the Police Court instituted by the defendant cannot be regarded as a prosecution ; and in view of the authority that he has cited, namely, *Kopal Khan Jan v. Bholanath Khettry*[1], I am inclined to think that there was really no prosecution of the plaintiff. From that case it is clear that where a Police Magistrate refuses summons, having gone through the preliminaries required by the Code, the proceeding is not to be regarded as a prosecution. In fact to constitute a prosecution the accused should be before the Court. Under our Criminal Procedure Code it is open to a magistrate to refuse summons in a case after examination of the plaintiff and such other witnesses as he may produce. That appears to be what happened in the present case, and, therefore, the proceeding in the Police Court can hardly be termed a prosecution. In that view the evidence led by the plaintiff to prove his innocence, even taking no account of the evidence for the defence, could hardly be said to be sufficient to discharge the burden on him.

I would dismiss the appeal with costs.

Ennis, J.—I am entirely of the same opinion. This is not an action for malicious prosecution, but an action for damages for injury caused by proceedings before prosecution.

1. *I. L. R. 30 Cal. 880.*

In these circumstances I consider that the amount of evidence required to prove that the plaintiff was innocent would be greater than in a case of malicious prosecution, in which case the acquittal or discharge which was the result of that prosecution could be relied on. In this case plaintiff has not produced evidence which would justify a Court in holding that he was innocent.

I would, therefore, make the same order.

Appeal dismissed.

Proctor for appellant—*D. W. Subasinghe.*

Proctor for respondent—*H. Guneratne.*

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PERERA *v.* SENEVIRATNE.

No. 8,873, D. C., Negombo.

Present: **Pereira & Ennis, JJ.**

25th February, 1913.

Sale of Goods Ordinance No. 11 of 1896 § 34—reasonable time, what is.

Reasonable time within the meaning of § 34 of Ordinance 11 of 1896 for inspection and approval of tea shooks would be a day, or at most two days.

Where there was a delay of 7 days in expressing disapproval,—

Held, that a reasonable time had lapsed. and that the contract must be taken to have been completed.

The facts appear sufficiently from the judgment of Pereira, J.

A. St. V. Jayewardene (with *Sansoni*) for the plaintiff-appellant.—The plaintiff delivered the goods to the defendant; and the latter having failed to intimate that he refused to accept the goods within a day or two at the most, must be deemed to have accepted them (See § 34 of Ordinance 11 of 1896).

Perera v. Seneviratne.

Pereira, J.

F. M. de Saram for the defendant-respondent.—Under § 34 a reasonable time is a question of fact depending on the circumstances of each particular case. A day or two would hardly be sufficient to inspect the goods. Considering the course of business between the parties, it is submitted that a reasonable time had not elapsed.

Pereira, J.—In this case I think the District Judge is right in holding that the defendant received 500 tea shooks subject to inspection and approval, and that "he reserved to himself the right to accept any of or all the goods". This holding of the District Judge is abundantly supported by the evidence, especially the document tendered by the defendant himself, namely, document D4, in which it is stated that 500 tea shooks were received from W. G. Perera subject to inspection and approval. That document fixes the date on which that happened as the 7th March, 1912. The receipt of shooks by defendant in that way can only mean that from that day, 7th March, 1912, the defendant received the shooks subject to inspection and approval. § 34 of the Sale of Goods Act applies. According to it a buyer is deemed to have accepted the goods when after the lapse of a reasonable time he retains the goods without intimating to the seller that he rejected them. The question is, what would be reasonable time for inspection and approval of these particular goods? There is nothing in the material before us to show that this could not be done in a day, or at most two days. The defendant in his evidence says that he inspected the goods, and he found them to be of worse quality than the previous consignments. No date is expressly mentioned, but it is pretty clear that he means that he made the inspection on the 7th March. He says: "On the 7th March I took the shooks into "my store, as plaintiff had no store of his own"; and then follows the statement in respect of the inspection of the goods. Anyway no reason has been shown why he should have delayed more than a day or two in intimating his approval or disapproval to the plaintiff. But, as found by the District Judge, he did not write to the plaintiff that he disapproved the goods until the 28th March, that is, some 20 days after

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Ennis, J.

the sale. The District Judge is inclined to think that he verbally intimated his disapproval to the plaintiff some day between the 14th and 27th March. Assuming that he did so on the 14th, there was a delay of 7 days, and in view of § 34 of the Sale of Goods Act the question is, whether more than a reasonable time had not elapsed without the defendant intimating to the plaintiff that he rejected the goods. I think it is quite clear that a reasonable time had lapsed by that date. That being so the contract of sale must be taken to have been completed. The District Judge says that business relations between the parties were "so slack and "informal that it would be unreasonable to require either "party to conform to the strict usage of commercial dealings "that subsists between really businesslike parties"; but it may be remembered that slack business relations must give way to the express provisions of the Ordinance. It is manifest that no such rejection of the process was made in this case within a reasonable time; and in the circumstances I think that the plaintiff is entitled to succeed.

I would set aside the order appealed from and enter up judgment for the plaintiff as prayed for with costs.

Ennis, J.—I am of the same opinion.

Set aside.

Proctor for appellant—*D. L. E. Amerasinghe.*

Proctor for respondent—*D. J. S Goonewardene.*

SOYSA *v.* RANESINGHE.

No. 21,514, D. C., Kandy.

Present: **Lascelles, C. J. & Wood Renton, J.**

13th March, 1913.

Arbitration—partnership—agreement to refer matters in dispute to arbitration—discretion of Court—charges of fraud—§ 8 of Ordinance No. 15 of 1866.

Under § 8 of Ordinance No. 15 of 1866 the Court has a discretion with regard to compelling the parties to an agreement to resort to arbitration; and the Court is not obliged to take this step if it is satisfied that there is sufficient reason why such matters cannot be referred to arbitration under the agreement.

Where fraud is charged, and objection to arbitration is by the party charging the fraud, the Court will not necessarily accede to it, but the Court will in general refuse to send the dispute to arbitration if the party charged with fraud desires a public inquiry in regard to the allegations made against him.

Wood Renton, J.—The claims in the respondent's plaint for the appointment of a receiver and for the grant of an injunction deal with matters beyond the competence of arbitrators, and can only be satisfactorily disposed of by the ordinary tribunals.

Bartholomeusz, for appellant.—Where fraud is charged it is true that a Court will refuse to send the matter in dispute to arbitration if the party charged with fraud desires a public inquiry. But when the objection to arbitration is by the party charging the fraud the Court will not necessarily accede to it, and will never do so unless a *prima facie* case of fraud is proved. Here the plaintiff alleges fraud, and he cannot object to arbitration. The Court will be inclined to refer matters in dispute to arbitration in terms of the agreement, unless the plaintiff shows very clear reasons for not doing so. It is not enough to say that fraud is alleged: a *prima facie* case should be made out. In *Russel v. Russel*[1] there were distinct charges of fraud supported by affidavit. The Court held that no *prima facie* case of fraud was proved.

1. *(1880) 14 C. D. 471.*

Soysa v. Ranesinghe,

(*Vide Biefield v. Browne*[1] ; *Walmsby v. White*[2]; and *Russel on arbitration, pp. 49, 50.*)

Lascelles, C. J.

de Sampayo, K. C., for the respondent.—Defendant charges plaintiff with fraud, and the plaintiff wants those charges to be inquired into in open Court. *Russel v. Russel*[3] is in our favour. The arbitrator cannot grant the relief sought for. He cannot appoint a receiver or issue an injunction.

Bartholomeusz in reply.

Lascelles, C. J.—This is an appeal from an order of the District Judge on an application under § 8 of Ordinance No. 15 of 1866 to stay the proceedings under the action, and to compel a reference to arbitration clause in the partnership agreement. Under the section in question the Court has a discretion with regard to compelling the parties to resort to arbitration, and the Court is not obliged to take this step if it is satisfied that there is sufficient reason why such matters cannot be referred to arbitration under the agreement. On reading the plaint and the affidavits it is clear that there are several reasons why the matter should not be referred to arbitration. The most important objection is to be found in the charges and counter-charges of fraud made by the two parties. Not only has the plaintiff brought serious charges of fraud against the defendant, but the defendant himself in his answer has charged the plaintiff with having submitted fictitious and false accounts. The plaintiff in his affidavit has claimed the right of having a public inquiry into these charges. It may be that, in respect of the charges of fraud brought by the plaintiff himself, he had no right to object to these being referred to the arbitrators inasmuch as he himself had made them. But with regard to the charges against the plaintiff, it is well settled that he is entitled to claim the benefit of a public inquiry according to law. This, I think, is in itself a sufficient reason to support the order of the

1. *(1894) 1 Ch. 521.* 2. *67 L. T. R. (N. S.) 433.*
3. *(1880) 14 C. D. 471.*

Soysa v. Ranesinghe.

Wood Renton, J.

learned District Judge. But there are several other matters alleged in the plaint with regard to which it seems to me at least doubtful whether they come within the purview of the arbitration clause. I think that the order made by the District Judge is sound in law, and I also think that it is the best that can be made in the interests of the parties; for I do not believe that the serious charges and counter-charges which had been made in these proceedings could be satisfactorily and finally determined by arbitration. I think the appeal should be dismissed with costs.

Wood Renton, J.—I am of the same opinion. The appellant's counter-charges of fraud against the respondent at once exclude the latter part of the rule affirmed by Sir George Jessel in the case of *Russell v. Russell*[1], that, where the objection to arbitration is by a party charging the fraud, the Court will not necessarily accede to omit, and bring the case within the former branch of that rule, viz., that, where fraud is charged, the Court will in general refuse to send the dispute to arbitration if the party charged with fraud desires —as the respondent here does desire—a public inquiry in regard to the allegations made against him. It may be that the arbitration clause with which we have to deal is enough to cover a possible dissolution of the partnership. But the claims in the respondent's plaint for the appointment of a receiver and for the grant of an injunction deal with matters beyond the competence of arbitrators, and can only be satisfactorily disposed of by the ordinary tribunals.

Appeal dismissed.

Proctor for Appellant—*C. Vanderwall.*

Proctor for Respondent—*G. E. de Silva.*

1. *(1880) 14 C. D. 471.*

MUDIANSE *v.* APPUHAMY.

No. 3,236, D. C., Kegalle.

Present: **Pereira & Ennis, JJ.**

26th February, 1913.

Kandyan Law—offspring of a Kandyan father by a Low-country Sinhalese woman—is he subject to Kandyan Law?—personal law—race—nationality.

The offspring of a Kandyan father by a Low-country Sinhalese woman cannot be said to be Kandyan, and is not subject to Kandyan Law.

Per Pereira, J.—I am aware of no rule of law that makes the offspring of a mixed union belong to the race of either the father or the mother.

The Kandyan Law is not what may be termed a local law governing all persons living within a certain area. It is rather a personal law attaching to the individuals wherever they may be belonging to a particular class or section of the Sinhalese subjects of the Crown. That being so the mere fact that a person is born or is resident within the Kandyan provinces is insufficient to bring him within the pale of the Kandyan Law.

§ 2 of the Ordinance No. 15 of 1876 has not the effect of rendering a Low-country Sinhalese woman who marries a Kandyan liable to be egarded as a Kandyan.

Bawa, K. C., for the plaintiff-appellant.

Sampayo, K. C., for the defendant-respondent.

Pereira, J.—The main question in this case is, whether the deceased, John Singho, an offspring (born within the Kandyan Provinces) of a Kandyan father by a Low-country Sinhalese woman, can be said to have been a Kandyan, subject to the incidents of what is known as the Kandyan Law. As observed by Clarence, J., in the case of *Wijesinghe v. Wijesinghe*[1], Kandyan Law is the customary law which a certain section of the community within the Kandyan

1. *9 S. C. C. 199.*

Provinces, namely, the Kandyan Sinhalese, were allowed, by the British Government, to retain. "It did not amount to a "distinct *lex loci rei sitæ* governing absolutely the devolution "of land." It is, therefore, not what may be termed a "local law" governing all persons living within a certain area : it is rather a personal law attaching to the individuals, wherever they may be, belonging to a certain particular class or section of the Sinhalese subjects of the Crown. That being so, the mere fact that a person is born or is resident within the Kandyan Province is insufficient to bring him within the pale of the Kandyan Law. The District Judge seems to think that because a child acquires the nationality and domicil of the father John Singho should be regarded as a Kandyan. As regards domicil, it will be seen that Burnside, C. J., in the case of *Williams v. Robertson*[1], was of opinion that a person could not acquire a Kandyan domicil as distinguished from a Ceylon domicil. He argued : "It would not be possible in "the present day to contend successfully that a domicil of "choice could be obtained in a community which does not "possess supreme or sovereign power." But, perhaps, the District Judge has used the term "domicil" in the less techni- "cal sense in which it is used in § 8 of Ordinance No. 5 "of 1852, which speaks of "Europeans and persons commonly known as Burghers" who are "domiciled" within the Kandyan Provinces. In any sense, however, domicil, as shown above, is no test to be applied in the solution of questions as to the applicability of Kandyan Law. As regards "nationality", the District Judge is apparently using the word in its strictly legal sense. It is only when the word is used in that sense that it can be said the wife takes the husband's nationality and the child the father's. Thus, every subject of the Crown, be he Singhalese, Tamil, Chinese, or Hottentot, is British in nationality, that is to say, he is subject to the British Flag ; but where the word is used in a looser and more popular sense—in the sense of race for instance—the rule relied on by the District Judge has no application at all. I am aware of no rule of law that

1. *8 S. C. C.* 36.

Mudianse v. Appuhamy.

Pereira, J.

makes the offspring of a mixed union belong to the race of either the father or the mother. Like the Eurasians of Ceylon and India, and the Mulattos of the Spanish settlements, they must fall into some separate and special group or groups to be known by some distinctive designation or designations. For these reasons the offspring of a Kandyan father by a Low-country Sinhalese woman cannot be said to be Kandyan. It is not necessary to inquire how he may be classified. If he is not, Kandyan Law cannot, of course, apply to him. He must be governed by the general law of the land.

Section 2 of Ordinance No. 15 of 1876 has been cited in the course of the argument in appeal. With reference to this section it has been held by this Court in the case of *Manikan v. Peter*[1] that a Low-country Sinhalese woman is not a person of "different race or nationality" from a Kandyan Sinhalese, and that, therefore, the section has not the effect of rendering a Low-country Sinhalese woman who marries a Kandyan liable to be regarded as a Kandyan. This decision is, I think, quite justified by the plain words used in the section, and it is, therefore, not permissible to speculate as to what was intended by it by the Legislature. The section refers also to Tamils of the Northern Province who are governed by the Thesawalamai; and, whatever the Legislature may have intended, it will, I think, be doing violence to language to say that these Tamils are of a race or nationality different from that of the other Tamils in the Island. Moreover, the section is silent as to the *offspring* of a union between persons who are not of the same race or nationality.

For the reasons given above I would set aside the judgment appealed from and remit the case to the District Judge for final decision on the footing that the devolution of the property of John Singho should be according to the general law of the land, and not the special Kandyan Law.

The appellants should have their costs.

1. (1899) 4 N. L. R. 243.

Wood Renton, J.—I have had some doubts. But, on the whole, I agree.

Case remitted.

Proctor for appellant.—*J. P. Samarasinghe.*

Proctor for respondent.—*A. A. Wickremesinghe.*

———:o:———

POROLIS *v.* ROMANIS *et al.*

No. 41,959, P. C., Panadura.

Present: **Pereira, J.**

14th June, 1913.

Penal Code—mischief—co-owner cutting down fence in assertion of right—no offence—Ceylon Penal Code, No. 2 of 1883 § 409.

A person can be said to be guilty of mischief only if he acts spitefully, maliciously, or wantonly. He should either intend to cause wrongful loss or know that wrongful loss is likely to be caused to some person.

A co-owner who removes a fence in the assertion of a real or fancied right to an enclosed portion of what is claimed as common property does not thereby commit mischief.

The complainant alleged that he was in possession of a defined portion of a land called Nawasigahawattte, which he had separated off over 10 years ago by a live fence, and that on the 14th of March, 1913, the 1st accused, with the aid of the 2nd and the 3rd accused, cut and removed the said fence. All the accused denied the said allegations, and the 1st accused led evidence to prove that the complainant was entitled merely to an undivided share and that he was a co-owner of the land. The learned Police Magistrate (F. D. Peries, Esq.) held that the complainant had possessed a separate share and that the accused with the object of disturbing his long-standing possession cut and removed the fence. He convicted the accused under § 409 of the Penal Code and sentenced them to two weeks' rigorous imprisonment each. The accused appealed.

Porolis v. Romanis.

Pereira, J.

A. St. V. Jayewardene for the appellants.—The evidence shows that the complainant is entitled to an undivided share in the land. The 1st accused is admittedly a co-owner, and as such was entitled to cut down the fence and thereby prevent the complainant from prescribing. Even if the accused cut down the fence, it is submitted they did so in the assertion of a right, and, therefore, they cannot be convicted of mischief.

E. G. P. Jayetileke for the respondent.—There is no appeal in this case, as the point of law now sought to be raised has not been certified as required by § 340 of the Criminal Procedure Code. [*Pereira, J.* I shall deal with the case in revision.] The evidence does not show that the complainant and the 1st accused are co-owners. The Magistrate has found that the complainant possessed a well-defined portion, and that the accused in cutting down the fence acted *mala fide*. [*Pereira, J.* Your deed deals with an undivided share.] We may have been given the share we possess by agreement. But even if the complainant is a co-owner, the accused had no right to take the law into their own hands. If the complainant was not entitled to possess the share he was possessing an action for partition should have been instituted. The fence is a very old fence, and the accused are guilty of a wanton act in having cut it down. [*Pereira, J.* They did so in the assertion of a right.] They denied having cut it at all. [*Pereira, J.* They denied through fear; but the evidence shows that it was done in the assertion of a right.] Even then it is wrongful, because the accused must have known that the removal of the fence would cause the complainant loss. The fence was intended to protect a young cocoanut plantation.

c. a. v.

Pereira, J.—In this case the accused have been convicted of committing mischief in that they cut and removed some sticks that are said to have made up a fence. There is on the whole sufficient to show that the accused have a

colourable title to some share of the land of which the complainant claims to be entitled to a defined portion. The accused do not admit that they removed a fence, but it is manifest from the evidence of the complainant himself that whatever was done by the accused was done as a protest against the possession by the complainant of a defined portion and in assertion of an interest in that portion.

It is only where a person acts wantonly that he can be said to be guilty of mischief. He should either intend to cause wrongful loss or know that wrongful loss is likely to be caused to some person. In other words, as observed above, he should act spitefully, maliciously, or wantonly. This can hardly be said of a co-owner who removes a fence in the assertion of a real or fancied right to an enclosed portion of what is claimed as common property. I think that the complainant should seek his remedy in the Civil Court. I set aside the conviction and acquit the accused.

Accused acquitted.

Proctor for appellants—*F. A. C. Tirimane.*

Proctor for respondent—*P. A. Goonsratne.*

JANGO APPU *v.* SOMAWATHI *et al.*

Weeresinghe—*Intervenient.*

No. 11,354, D. C., Galle.

Present : **Pereira & de Sampayo, JJ.**

28th June, 1913.

Partition—alienation of entire land pending proceedings—valid—"interest"—Partition Ordinance No. 10 of 1863 § 17, scope of.

An alienation pending an action for partition of the entirety of the subject of the action does not contravene the provisions of § 17 of Ordinance No. 10 of 1863.

Per Pereira, J.—That section (viz., § 17) provides that it shall not be lawful for "any of the owners to alienate his share or interest". The words "any of the owners" clearly imply that the case contemplated is a case of property owned by several owners, and hence the word "interest" can only mean some interest short of absolute ownership of the entirety of the property.

This was an action for the partition of a land called Delgahakoratuwawatte. The plaintiff claimed a half-share and allotted the remaining half-share to the defendant. The action was filed on the 15th day of July, 1912 Before the trial the respondent moved to intervene, claiming the whole land on a deed executed in his favour on the 16th July, 1912, by a person claiming adversely to both the plaintiff and the defendant. The plaintiff objected to the intervention being allowed on the ground that the deed on which the intervenient claimed was void as being obnoxious to § 17 of the Partition Ordinance No. 10 of 1863. The learned District Judge held that inasmuch as the intervenient's vendor was not a party to the action, and as summons had not been served on the defendant at the date of the execution of the deed in favour of the intervenient, the deed was not obnoxious to the provisions of § 17. He accordingly allowed the intervention, and againstt his order the plaintiff appealed.

Jango Appu v. Somawathi.

Pereira, J.

Gooneratne for the appellant.—An alienation pending partition proceedings is void though by persons not parties to the suit. (See *Annamalai Pillai v. Perera*[1]; *Dewar Umma v. Ismail Marikar*[2]). The deed in favour of the intervenient was executed after the institution of the partition proceedings. Under the Civil Procedure Code the commencement of an action is the filing of a plaint, and not the service of summons. The doctrine of *lis pendens* does not apply in view also of the provisions of § 17 of the Partition Ordinance. He also cited *Silva v. Gimara*[3].

G. Koch for the respondent.—Section 17 of the Partition Ordinance only affects deeds relating to undivided shares or interests. In all the cases cited undivided shares were dealt with. § 17 should be read with § 2, which makes the institution of a partition suit competent only where a land is held in common. The order of the District Judge allowing intervention is therefore right, although the reasons for his order cannot be supported.

Gooneratne in reply. The word "interest" in § 17 should not be confined to an "undivided interest". The language of § 17 is wide enough to include a case like the present.

c. a. v.

Pereira, J.—I will not enter into the merits of the reasons given by the District Judge for his order because I think that the order can be supported independently of those reasons. The alienation in the present case was not an alienation of a share in the property which is the subject of the action, but of the entirety of the property; and to such a case § 17 of the Partition Ordinance does not, in my opinion, apply. That section provides that it shall not be lawful for "any of the owners to alienate his undivided share or interest". The words "any of the owners" clearly imply that the case contemplated is a case of property owned by several

1. *6 N. L. R. 108.* 2. *3 Bal. 99.*
3. *7 N. L. R. 135.*

Jango Appu v. Somavathie.

owners, and hence the word "interest" can only means some interest short of absolute ownership of the entirety of the property. I would dismiss the appeal with costs.

de Sampayo, J.

de Sampayo, J.—The alienation is not only not of an undivided share or interest in the property within the meaning of § 17 of the Ordinance, but by an entire stranger who claims adversely to both the plaintiff and the defendant. think it does not contravene the provisions of that section I agree that the appeal should be dismissed with costs.

Appeal dismissed.

Proctor for appellant.—*Henry Gooneratne.*

Proctor for respondent.—*R. A. H. de Vos.*

———:o:———

MANAKULARATNE *v.* WICKRAMANAYAKE.

No. 34,245, D. C., Colombo.

Present: **Lascelles, C. J. & Wood Renton, J.**

13th March, 1913.

Husband and wife—debts incurred by wife as publica mercatrix—husband liable—Roman-Dutch Law—Matrimonial rights and inheritance—Ordinance No 15 of 1876 § 10.

A husband is liable for the debts of his wife though incurred as a *publica mercatrix.*

Lascelles, C. J.—The husband's liability under the Roman-Dutch Law for his wife's trade debts is not an incident of nor derived from the community of goods. It arises from the marital power which the Civil Law attributes to the husband, a power which *Voet* observes *jure vetere parum a patria potestate distabat.*

H. A. Jayewardene for the appellant.—Section 10 of the Matrimonial Rights and Inheritance Ordinance has repealed the common law liability of the husband for his wife's trade debts. Under the community of goods the husband got all the benefit of his wife's earnings, hence it was reason-

able that he should be liable for her debts also. But the Ordinance of 1876 has abolished community of goods, and by § 10 the wife has absolute control and power of disposition over the profits of any business carried on by her independently of her husband. Her husband has no right over it. Therefore it is reasonable that he should not be liable for any debts of his wife arising from her separate trade or business.

A. St. V. Jayewardene for the respondent.—Section 10 of the Matrimonial Rights and Inheritance Ordinance nowhere says that a husband is not liable for the trade debts of his wife. It only recognizes the separate estate of the wife in her earnings. A change of such far-reaching effect cannot be imported into the common law merely by implication from § 10. If the Legislature wanted to effect a change it would have specifically expressed so. The Ordinance of 1876 has always been construed as recognizing the liability of the husband to his wife's trade debts. Further, the husband's liability is not an incident of the community of goods. This arises from his marital power. By this power the husband becomes the curator of his wife (*Voet 23. 2. 41*) and he must be held liable for the contracts of his wife entered into by her with his consent express or implied. The husband's consent must be implied where the wife contracts as *publica mercatrix*.

H. A. Jayewardene in reply.

c. a. v.

Lascelles, C. J.—This case raises a point of some interest with regard to the liability of a husband for his wife's trade debts. The learned District Judge has found as a fact that the 2nd defendant was trading in betel leaves independently of her husband, and has disbelieved the evidence that the betel leaves in respect of which the action is brought were supplied on the husband's orders. He has also found that the 2nd defendant carried on the betel business with the knowledge and consent of her husband, and that the betel leaves were sold by the wife alone. On these facts

Manakularatne v Wickramanayake.

Lascelles, C. J.

it is contended that the husband is not liable for the wife's debt. The argument is that § 10 of the Matrimonial Rights and Inheritance Ordinance of 1876 has by implication repealed the common law with regard to the husband's liability for debts incurred by his wife as a "*publica mercatrix*". It is said that the recognition of the separate property of a married woman in the profits of any business carried on by her separately from her husband is inconsistent with the husband's liability for debts incurred by his wife in such employment.

Before discussing this argument it should be noticed that although the Ordinance has been in force for some twenty-six years § 10 of the Ordinance has never been understood to have this far-reaching effect. It should further be noticed that if it was the intention of the Legislature to repeal an important branch of the common law it is reasonable to expect that this intention would have been specifically expressed. It is difficult to believe that it was intended by § 10 to deal at all with the question of the husband's liability of his wife's debts.

The argument addressed to us was to the effect that under the community of goods the husband got the benefit of his wife's earnings which would go into the community and thus be under the husband's control; hence, it was argued, the husband was reasonably held responsible for his wife's debts. But as soon as the wife's separate property in the profits of her separate trading came to be recognized the reason for the husband's liability came to an end.

This reason would not be without a certain plausibility if the husband's liability under the Roman-Dutch Law for his wife's trade debts were an incident of and derived from the community of goods. But this is not the case. The liability of the husband arises from a totally different source, namely, the marital power which the civil law attributed to the husband, a power which *Voet* [1] observes "*jure*

1. *23, 2, 41.*

velere parum a patria potestate distabat". The effect of marriage was to constitute the husband the curator of his wife[2]. Hence when the wife contracted with the consent, express or implied, of the husband, the latter was held responsible for her debts. And it was reasonably considered that the consent of the husband must be implied when the wife was "*publica mercatrix*" and the debt incurred "*mercaturae intuitu*". In such cases the wife was held to have contracted as the husband's agent and on his mandate.

On this view of the fundamantal principles of the Roman-Dutch Law with regard to the husband's responsibility for his wife's debts it is clear that § 10 of the Matrimonial Rights and Inheritance Ordinance 1876 cannot be construed to have repealed by implication the existing law on the subject.

The appeal in my opinion should be dismissed with costs.

Wood Renton, J.—This appeal raises, apparently for the first time, an interesting point in the law of husband and wife in Ceylon. A woman, married after the Matrimonial Rights and Inheritance Ordinance (No 15 of 1876) came into operation, trades independently of her husband, but with his knowledge and consent. She is admittedly herself liable for debts incurred by her in the course and for the purposes of this trade. But is her husband liable also? The learned District Judge has answered this question in the affirmative, and, in my opinion, he has done so rightly.

The case turns on the interpretation and scope of § 10 of the Ordinance of 1876. That section is in these terms :—

> "The wages and earnings of any married woman, "whether married before or after the proclamation of "this Ordinance, which may be acquired or gained by "her after the proclamation of this Ordinance in any "employment or trade in which she is engaged or which "she carries on separately from her husband, and also "any money or property so acquired by her through the

Manakularatne v. Wickramanayake.

Wood Renton, J.

"exercise of any literary, artistic, or scientific skill, shall "be deemed and taken to be her separate property, "independent of the debts, control, or engagements of "her husband, and she shall have as full power of "dealing with and disposing of the same or any investment thereof as if she were unmarried, and her receipts "alone shall be a good discharge for such wages, earnings, money, and property and the principal and "interest of any investments thereof."

It is contended that when the Legislature in this enactment provided that the wife should have as full power of dealing with and disposing of the class of separate property which it created as if she were unmarried, it must have intended to free her husband from all her liabilities in regard to it. I do not think that decisions under the English Married Women's Property Acts give us much assistance in dealing with the point raised by this appeal. These decisions turn largely on considerations as to whether or not a married woman in contracting debts should be deemed to be her husband's agent; whereas Roman-Dutch Law, on which the Ordinance of 1876 was grafted, subjected the wife's power of contracting to her husband's control because it regarded her as being under his guardianship or curatory. It will be observed that § 10 applies whether the marriage was contracted before or after the commencement of the Ordinance. Under the Roman-Dutch Law, apart from the Ordinance, where a wife with the consent of her husband publicly carried on a trade, her debts incurred in the course of such trade became debts of the community. (See *Burge, 2nd ed. vol. 3 page 400.*) § 8 of the Ordinance of 1876 abolishes for the future the community of goods as a consequence *ipso jure* of marriages, and § 10 relaxes, in the case of women married in community before the Ordinance came into operation, the old law of community to this extent that it makes the class of property with which it deals the exclusive property of the wife. But § 10 does not provide that in such cases debts incurred by the wife in regard to her separate property shall be her debts alone, nor does it contain any

language that would justify us in laying down such a rule even in regard to marriages contracted after the Ordinance came into operation, and, therefore, not subject to the law of community. § 10 confers upon the wife express rights and I have no doubt, also implied liabilities in regard to her separate property. But it contains nothing that would warrant us in holding that it releases a husband from his common law obligations as to debts incurred by his wife while trading with his consent as a public merchant.

I would dismiss this appeal with costs.

Appeal dismissed.

Proctor for appellant.—*G. A. Wille.*

Proctor for respondent.—*O A. Jayesekere.*

———:o:———

PERIS *v.* VALENTINE *et al.*

No. 18,267, P. C., Colombo.

Present: **Ennis, J.**

19th December, 1912.

False case—punishment under § 197, Criminal Procedure Code—frivolous and vexatious cases.

Section 197 of the Criminal Procedure Code is meant to deal with cases other than false cases. The section was never intended to enable the Court to punish what was in effect perjury.

This was an appeal by the complainant against an order to pay compensation under section 197 of the Criminal Procedure Code.

H. A. Jayewardene for the complainant-appellant.—§ 197 empowers the Magistrate to punish those who bring frivolous and vexatious complaints before the Court. It does not empower the magistrate to punish summarily the serious offence of instituting a false charge. "Vexatious" must be

Peris v. Valentine.

Ennis, J.

read as *ejusdem generis* with "frivolous". Both the words apply to that class of cases in which the law had been invoked heedlessly and without sufficient cause. *Loku Mal v. Jetho Male.*[1]

Sandrasegra for the respondent.—A case that is false is also vexatious.

Ennis, J.—In my opinion the order made in this case for compensation cannot stand. The Magistrate has found the case to be entirely false, and § 197 is, in my opinion, meant to deal with cases other than false cases. In a false case there is a criminal action for perjury, there is also a civil action for the recovery of damages, neither of which actions exist in cases which are merely frivolous or vexatious; and I consider the section was never intended to enable the Court to punish what was, in effect, perjury.

I allow the appeal and set aside the order for compensation, and in review set aside the order for the payment of Crown costs.

Set aside.

1. *(1902) 9 Cr. L. J. 255.*

VANMIGALINGAMUDALY *v.* SANGARAN ASARY.

No. 30,113, C. R., Colombo.

Present: **Pereira, J.**

24th April, 1913.

Decisory oath—failure of party challenged to take the oath through accident or unforeseen cause—can opposite party withdraw

When a party to a judicial proceeding has once agreed to be bound by an oath to be taken by another party he cannot be allowed to withdraw from his undertaking except for reasons which the Court considers to be sound.

If the party who has consented to take an oath designedly or negligently omits to do so at the time and place fixed, the opposite party may be allowed to refuse to continue to be bound by his undertaking; but where the omission is due to pure accident or to unforeseen causes over which the party in default had no control, the opposite party should not be allowed to withdraw from his undertaking to be bound by the oath.

In this case the defendant challenged the plaintiff to take the decisory oath in a Hindu temple at Kotahena. The plaintiff accepted the challenge, but he failed to take the oath the reason being that when he went to the Court premises in search of the Aratchie who was commissioned to administer the oath the Aratchie was not there. The plaintiff having waited for some time went away. When the case came on subsequently plaintiff's counsel contended that the failure to take the oath was due to pure accident and that the plaintiff should be given another opportunity to take the oath. The Commissioner was of opinion that whether the failure was due to accident or design, the commission issued to the Aratchie having expired on the day on which the oath was to be taken the defendant ceased to be liable to be bound by the plaintiff's oath. He accordingly proceeded with the trial and dismissed plaintiff's action with costs. The plaintiff appealed.

Arulanandan for the appellant.—The failure of the plaintiff to take the oath was due to pure accident. He did all he could to comply with his undertaking; but on account

Venmigalingamudaly. v Asary.

Pereira, J.

of the absence of the Aratchie he was unable to take the oath. Under such circumstances the respondent should not be allowed to withdraw from his undertaking (*Ram Naran Singh v. Babu Singh*)[1]. The respondent should not be allowed to withdraw from a solemn engagement entered into by him in open Court merely because of an accident. There cannot be said to be any neglect or design on the part of the appellant.

The opinion of the Commissioner that the commission issued to the Aratchie having expired the respondent can withdraw is not sound. The Court has the power to reissue the commission.

E. G. P. Jayetileke for the respondent.—There is no proof that the appellant's failure to be at the appointed place was due to accident. Even if it was, the commission had expired and could not be re-issued. The respondent agreed to be bound by the oath of the appellant on a particular day at an appointed place.

Arulanandan in reply.—In matters of this kind the day is not of the essence of the agreement.

c. a. v.

Pereira, J.—In this case it appears that the defendant offered to be bound by an oath to be taken by the plaintiff in a Hindu temple at Kotabena. The plaintiff failed to take the oath, and thereupon the Commissioner proceeded with the trial in spite of objection taken thereto by the plaintiff's counsel. The contention in the Court below apparently was the same as that pressed in appeal, namely, that the omission of the plaintiff to take the oath was due to accident. The appellant's counsel has stated without contradiction by the other side that he moved the Commissioner to decide before proceeding with the trial the question whether the plaintiff's omission to take the oath was due to accident, but that the Commissioner thought that the question was irrele-

1. *I. L. R. 18 All 46.*

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Pereira, J.

vant. It appears from the judgment that the Commissioner was of opinion that whether the omission was due to accident or design the so-called commission issued to some officer of the Court to administer the oath having expired the defendant ceased to be liable to be bound by the plaintiff's oath. I cannot assent to that proposition. When a party to a judicial proceeding has once agreed to be bound by an oath to be taken by another party he cannot be allowed to withdraw from his undertaking, except for reasons which the Court considers to be sound. The case of *Ram Narain Singh v. Babu Singh*[1], cited by the appellant's Counsel, is in point. If the party who has consented to take an oath designedly or negligently omits to do so at the time and place fixed, the opposite party may be allowed to refuse to continue to be bound by his undertaking; but where the omission is due to pure accident, or to unforeseen causes over which the party in default had no control, it will be manifestly unreasonable, and, indeed it will lead to an undesirable evasion of a solemn agreement entered into in open Court, to allow the opposite party to withdraw from his undertaking to be bound by the oath. The Court should in all cases adjudicate upon the soundness of the reason given for the omission. The order on this appeal will be that the case do go back to enable the Commissioner to adjudicate upon the soundness of the reason given by the plaintiff for his omission to make oath so agreed upon at the time and place appointed for the purpose. If he rules in his favour, and the plaintiff makes oath thereafter, the judgment appealed from will be vacated by the Commissioner and judgment entered up in terms of the agreement of the 3rd December, 1912. Otherwise, the present judgment will stand. The appellant will have his costs of appeal.

Set aside and sent back.

Proctor for appellant.—*J. H. R. Joseph.*

Proctor for respondent.—*Adrian de Livera.*

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Action—

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(ii) *By judgment debtor to set aside sale for irregularities.*
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(iii) *Rei vindicatio—sale pending mortgage action*
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(ii) *When document sufficiently stamped to be administable in evidence.*
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Administrators—

Stamp—probate or administration duty.

The value of an estate for the purpose of ascertaining probate or administration duty is its value at the death of the deceased, and not at the date of filing of the final account.

IN RE LAST WILL OF DON MATHES DE SILVA, 486, DISTRICT COURT, TANGALLE 41

Agreement—

(i) *Subsequent written agreement to vary prior notarial mortgage bond.* *See* "EVIDENCE. (ii)" 45

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Appeal,—*See also* "VILLAGE TRIBUNAL."

Appealable order—order of Police Magistrate referring to a Village Tribunal a charge not triable by that Tribunal.—Criminal Procedure Code § 338

An order of transfer to the Village Tribunal of a charge which that Tribunal has no power to entertain is, as regards that charge, a final order within the meaning of § 338 of the Criminal Procedure Code, and is appealable.

GOONEWARDENE *v.* SILVA, No. 18035, Police Court, Negombo. 53

Arbitration—

(i) *Arbitrator receiving fees from one party before award made—legal misconduct—bias—unconscious bias—proof of partiality not necessary.*

It is legal misconduct for the arbitrator to receive his fees from one of the parties before the completion of his award.

Any act amounts to legal misconduct if it would give rise to a reasonable probability that the arbitrator would be subjected to any improper influence.

In order to constitute legal misconduct it is not necessary to prove dishonesty or partiality on the part of the arbitrator.

FERNANDO *v.* MIGEL APPU. No. 19371, Curot of Requests, Negombo. 210

(ii) *Partnership—agreement to refer matters in dispute to arbitration—charges of fraud—discretion of Court—§ 8 of Ordinance No. 15 of 1866.*

Under § 8 of Ordinance No. 15 of 1866, the Court has a discretion with regard to compelling the parties to an agreement to resort to arbitration; and the Court is not obliged to take this step, if it is satisfied that there is sufficient reason why such matters cannot be referred to arbitration under the agreement.

Where fraud is charged, and objection to arbitration is by the party charging the fraud, the Court will not necessarily accede to it, but the Court will in general refuse to send the dispute to arbitration if the party charged with fraud desires a public inquiry in regard to the allegations made against him.

WOOD RENTON, J.—The claims in the respondent's plaint for the appointment of a receiver and for the grant of an injunction deal with matters beyond the competence of arbitrations, and can only be satisfactorily disposed of by the ordinary tribunals.

SOYSA *v.* RANESIGHE, No. 21,514, District Court, Kandy. 157

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Attorney-General—
See "APPEAL" AND "VILLAGE TRIBUNAL"

Where Police Magistrate orders transfer of case to Village Tribunal, no leave necessary.

GOONEWARDENE *v.* SILVA, No. 18035, Police Court, Negombo. 53

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Bona fide possessor *See* "IMPROVEMENTS" 86

Cause of Action. *See* "CIVIL PROCEDURE CODE (i)"

A defendant in an action in the Court of Requests is not bound to claim in reconvention on a distinct and separate cause of action.

PERERA *v.* PESONAHAMY, No. 303, Court of Requests, Gampola 26

Civil Procedure Code

(i) CIVIL PROCEDURE CODE § § *207 and* § *817—Court of Requests—action by mortgagors for cancellation of bond—failure of mortgagee to claim in reconvention money due—Subsequent action by mortgagee—is action resjudicata?*

In an action by a mortgagor to have a mortgage bond cancelled and discharged, the mortgagee is is not bound to claim in re-convention the money due on the bond, and a subsequent action on the bond is not barred by § 207 or § 817 of the Civil Procedure ode.

A defendant in an action is not bound to claim in reconvention on a distinct and separate cause of action.

An action for the cancellation of a bond can hardly be regarded as an action for a breach of contract within the meaning of § 817 of the Civil Procedure Code.

PERERA *v.* PESONAHAMY, No. 303, Court of Requests, Gampola 26

(ii) *Mortgage of several lands—right of mortgagee to sell in any order—absence of special directions in the decree—§ 207. Civil Procedure Code.*

In the absence of a special direetion by the Judge, it is quite open to the mortgage creditor to exercise his own discretion as to the order in which the lands shall be sold.

The mere fact that the lands are scheduled in the decree in a certain order is not tantamount to a direction to sell them in that order.

WICKREMESINGHE *v.* PUNCHI NONA, District Court, Matara, No. 5246. 43

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(iii) CIVIL PROCEDURE CODE § 344—*execution of decree—suit by judgment-debtor to set aside sale on the ground of irregularities—parties to the suit.*

A judgment debtor who seeks to have a sale in execution of a decree set aside on the ground of irregularities cannot institute a separate action for the purpose but should proceed in the same action as provided by § 344 of the Civil Procedure Code.

The fact that the purchaser is a stranger to the action in which the decree was passed will not prevent the application of § 344.

PERERA *v.* ABEYRATNE, District Court, Colombo, No. 33620. 55

(iv) CIVIL PROCEDURE CODE § 218 (k)—*Fiscal's sale of fidei-commissary's interest during life-time of fiduciarius—expectant or contingent interest.*

During the life-time of the fiduciary the interest of a fidei-commissary in property subject to a *fidei-commissum* is an expectancy of succession by survivorship within the meaning of § 218 (k) of the Civil Procedure Code and is not capable of seizure and sale.

MOHAMEDBHOY *v.* MARIKAR, District Court, Colombo, No. 24875 71

(v) ISSUE OF WRIT—*death of judgment-debtor—seizure and sale of property after death of judgment-debtor—legal representative not substituted as defendant of record—sale confirmed—are seizure and sale valid?—Civil Procedure Code §§ 341 and 344.*
See "SEIZURE (iii)"

OMER *v.* FERNANDO, No. 31771, District Court, Colombo 128

Cheque—
A post-dated cheque is not invalid.
The effect of the Stamp Ordinance No. 22 of 1909 has been to assimilate the Law of Ceylon as regards post-dated cheques to the Law of England.

Section 64 of the Stamp Ordinance of 1909 does not apply to cheques.

To determine whether a document is sufficiently stamped for the purpose of deciding upon its admissibility in evidence, the document itself must be looked at and not any collateral circumstances.

Ramenchetty v. Ghouse, (16 Cal. 433) followed.

The imposition of a penalty will not render a contract illegal where the object of the penalty is to deter persons from entering into the contract or to protect the revenue.

Mellis v. Shirley and Freemantle Loca,l Board (16 Q. B. D. 446) followed.

KRISTNAPPA CHETTY *v.* CARPEN CHETTY, No. 21155, District Court, Kandy 11

Claim in reconvention

See " CIVIL PROCEDURE CODE (i) " 26

Compensation, order for,

See " CRIMINAL PROCEDURE CODE (i) " 49

Complaint—

Frivolous or Vexatious—See " CRIMINAL PROCEDURE CODE (i)" 49

Confession—

The accused was tried for voluntarily causing hurt to B. The defence set up by him in his statutory declaration in the Police Court, and also in the Supreme Court, was that he had struck B with a mammoty in defending himself against an attack which B made on him with a knife. The prosecution proved that the accused had made a certain statement to a police officer (headman), and that in that statement he had not charged B with having attacked or threatened to attack him with a knife or mentioned that he had himself struck B with a mammoty.

HELD, that such a statement is a confession and therefore inadmissible in evidence under § 25 of the Evidence Ordinance.

The evidence of the police officer referring to the omission of the accused to set up the defence on which he subsequently relied was evidence of a statement by the accused suggesting the inference that the defence on which he relied was not set up by him at the time when, if true, it would naturally have been set up and that it was therefore false and consequently that he had committed the offence of which he was charged.

PER LASCELLES, C.J.—When a police headman is allowed to prove that the accused, shortly after the offence was committed, made a statement to him, and in that statement made no reference to the plea of self-defence, he is, in effect, allowed to prove that the accused made a statement which was different from and inconsistent with the defence which he afterwards set up. Proof of such a statement is something more than evidence of conduct under § 8 of the Evidence Ordinance.

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PER PEREIRA, J.—It is, I think, clear that if evidence of an actual statement suggesting an inference adverse to the accused is inadmissible, *a fortiori* would evidence be inadmissible which in a way is descriptive of a statement and which carries with it the insinuation that an exculpatory circumstance relied on by the accused for his defence was no part of his statement.

PER ENNIS, J.—To allow evidence by a police officer of the substance of a statement made to him by an accused from which incriminating circumstances may be inferred would, I consider, be contrary to the intention of § 25.

Deonis v. Peeris Appu, (7 Tamb. 28) followed.

THE KING *v.* KALU BANDA, No. 16,189 Police Court Kegalle — 61

Confirmation of Sale by Court—

Seizure invalid—See "SEIZURE" — 128

Contract—

(i) *action for cancellation of mortgage bond—breach of contract—See* "CIVIL PROCEDURE CODE (i)" — 26

(ii) *Is penalised contract illegal? See* "Cheque" — 11

Co-owner—

(i) One co-owner cannot build on a land held in common without the consent of the other co-owners, unless the land was acquired, or at least held, by the co-owners as a building site.

Where such consent is withheld, the remedy of a co-owner is to institute a partition action.

The law does not prohibit one co-owner from the use and enjoyment of the property in such manner as is natural and necessary under the circumstances.

Silva v. Silva (6 N.L.R. 225) and *Siyadoris v. Hendrick* (6 N.L.R. 275) referred to.

GOONEWARDENE *v.* GOONEWARDENE, No. 7334, Court of Requests, Galle — 149

(ii) *Cutting down fence in assertion of right—See* "PENAL CODE (ii)" — 163

Costs—

Costs of the day—order dismissing action if costs not paid before next day of trial bad.

See "JURISDICTION" — 99

Court of Requests—

(i) *Action for cancellation of mortgage bond—defendant not bound to claim money due in reconvention.*

See "CIVIL PROCEDURE CODE (i)" — 26

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(ii) JURISDICTION—*Remainder of the term of the lease—damages for being kept out of possession before action—value of right involved.*

Where the plaintiff alleged an ouster and claimed a right of possession for the remainder of the term of a lease and also claimed damages for having been kept out of possession for the period before action.

HELD, that the value of the plaintiff's right to possession must be calculated as for the full term of the lease, as the plaintiff can be awarded damages for the period before action only on the footing that he was denied possession on the lease.

DEONIS *v.* LABONIS, No. 6868 Court of Requests, Matara 125

Court—

See "JURISDICTION," "COURT OF REQUESTS" "POLICE COURT" 26,53,99,125

Criminal Procedure Code—

(i) *Frivolous or vexatious complaint—order for compensation—all complainant's witness not examined—§ 197 (i) Criminal Procedure Code.*

There is nothing in § 197 (i), Criminal Procedure Code which either expressly or by necessary implication requires a Police Magistrate to hear every witness whom a complainant may desire to call before exercising the powers with which the section has invested him.

A charge that is deliberately false is "vexatious" within the meaning of § 197.

VELUPILLAI *v.* CASIPILLAI, No. 6705 Police Court Jaffna 49

(ii) *False Case—punishment under § 197—frivolous and vexatious cases.*

Section 197 of the Criminal Procedure Code is meant to deal with cases other than false cases. The section was never intended to enable the Court to punish what was in effect perjury.

PERIS *v.* VALENTINE, No. 18267 Police Court, Colombo 173

(iii) *Reference by a Police Court to the Village Tribunal of a charge not triable by that Tribunal—final order—appealable—§ 338. Criminal Procedure Code.*

See "POLICE COURT" 53

Damages— PAGE

(i) Where A caused a police constable to seize and take into custody a pair of cart wheels belonging to B, alleging that the same were stolen from him, and where B was unsuccessfully prosecuted for the theft of the wheels and subsequently brought an action against A for recovery of damages consequent on the detention of the wheels, and also for damages incurred in connection with the criminal prosecution, but did not claim damages for injury to honour, reputation or feelings,

HELD, that he could maintain his claim for damages consequent on the detention of the cart wheels without averring or proving malice, but not the damage caused by reason of any action of the Police Court, after the charge against him had heen preferred to it.

SEMBLE, that *Injuria*, in the more specific sense, means any word or deed calculated to hurt the feelings of another or to injure him in his honour, dignity or reputation, and is not actionable unless the offending party can be said to have the *animus injuriandi*.

Under the Roman-Dutch Law proof of *animus injuriandi* is not necessary in an action where the damage claimed is limited to loss of property or of its temporary use or the temporory loss of liberty by reason of false prosecution.

Even under the English Law it is only in the event of an actual prosecution and not of mere information to the Police that malice need be averred and proved against the defendant.

Austin v. Dowling (5 C. P. 540) followed.

FERNANDO *v.* PERERA, No. 19796, Court of Requests, Negombo 96

(ii) *Remedy of a party defrauded by vendor—Suit for damages.*
See "VENDOR AND VENDEE" 71

(iii) *Can damages be claimed for breach of non-notarial lease?*

See "LEASE" 121

(iv) *Lessee kept out of possession—Damages.*
See "COURT OF REQUESTS" 125

(v) *Damages for malicious prosecution.*
See "MALICIOUS PROSECUTION" 151

Decisory Oath—

(i) The failure on the part of the officer administering an oath to take and record contemporaneously the evidence of the persons sworn or affirmed is an irregularity which is fatal to the proceedings.

DHARMASENA *v.* SUDUMAMA, No. 15155, Court of Requests, Chilaw 37

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(ii) When a party to a judicial proceeding has once agreed to be bound by an oath to be taken by another party he cannot be allowed to withdraw from his undertaking except for reasons which the Court considers to be sound.

If the party who has consented to take an oath designedly or negligently omits to do so at the time and place fixed, the opposite party may be allowed to refuse to continue to be bound by his undertaking; but where the omission is due to pure accident or to unforseen causes over which the party in default had no control, the opposite party should not be allowed to withdraw from his undertaking to be bound by the oath.

VANMIGALINGAMUDALI *v.* SANGARAN ASARY, No. 30,113 Court of Requests, Colombo 175

Decree—

(i) *Mortgage of several lands—right of mortgagee to sell in any order—absence of special directions in the decree—Civil Procedure Code § 201.*

See "MORTGAGE (ii)" 43

(ii *Sale in execution of decree—irregularities—suit by judgment-debtor to set aside sale.*

See "CIVIL PROCEDURE CODE (iii)"

Document—

When sufficiently stamped to be admissible in evidence—See "CHEQUE" 11

Donation—

Adulterine bastards can take under a gift or bequest from the father.

Rabot v. Silva 12 N.L.R. 81) and *Wickremanayake v. Perera* (11 N.L.R. 171) followed.

JAYASHAMY *v.* ABEYSURIYA, No. 1178 District Court Tangalle 34

English Law—

See "CHEQUE" 11

Estoppel—

See "CIVIL PROCEDUR CODE (i)" 26

See "FIDEI-COMMISSUM (ii)" 71

Evidence Ordinance—

(i) §§ *13 & 43—previous judgment not between same parties—a "transaction or instance"—how far relevant in subsequent litigation*—res inter alios acta—resjudicata.

None of the provisions of the Evidence Ordinance were intended to subvert the principle *res inter alias acta alteri nocere non debet.*

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A judgment not admissible in evidence under §43 of the Evidence Ordinance could only be admissible under § 13 to prove litigation on the claim made, that is to say, the assertion or denial of the custom or right in question which constitutes a transaction or particular instance within the meaning of § 13. It cannot be used to prove that the litigation was decided in favour of one party rather than the other, nor are its reasons relevant, and it is not to be relied on to show by itself in a subsequent litigation that either of the parties were right or wrong in their assertion or denial of the claim litigated or adjudicated upon.

ISMAIL LEBBE *v.* UDUMA LEBBE, No. 3653, District Court, Kalutara 1

(ii) § 92—*notarial mortgage bond—subsequent written agreement—to change mode of payment and to increase burden of debt—whether admissible in evidence and enforceable in any respect—interest affecting land.*

A subsequent non-notarial written agreement, which not only changes the mode of payment of a debt but increases its burden, is inadmissible in evidence for the purpose of varying any prior notarial mortgage bond. It constitutes one entire promise which is partly within and partly without § 2 of Ordinance 7 of 1840, and therefore is not enforceable in any respect.

Such an agreement makes the security bear a larger debt, and consequently does affect the lands or immovable property mortgaged.

Kiribanda v. Ukkubanda (14 N.L.R. 181) and *Lushington v. Carolis* (14 N.L.R. 189) distinguished.

FONSEKA *v* NARAYANEN CHETTY, No. 8256, District Court, Negombo 45

(iii) §§ *8, 17, & 25—See* "CONFESSION" 61

(iv) *Informal lease—non-notarial—admissibility in evidence. See* "LEASE" 121

Exceptio Rei Venditae et Traditae—

The plea of exceptio *rei venditae et traditae* is not available to a party who has never been in possession, and though it is available against a vendor it is not available against a subsequent purchaser from the vendor.

Alwis v. Fernando (14 N.L.R. 22) followed.

MOHAMEDBHOY *v.* LEBBE MARIKAR, No. 24875, District Court, Colombo 71

False Case—

See "CRIMINAL PROCEDURE CODE (ii) and (iii)" 49,173

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Fidei-commissum—

(i) A prohibition against alienation out of the family of a legatee or donee is itself sufficient to create a *fidei-commissum* in favour of the members of the family.

ROBERT *v.* ABEYWARDENE, No. 10990, Court of Requests, Galle 23

(ii) During the life-time of the fiduciary the interest to a fidei-commissary in property subject to a *fidei commissum* is an expectancy of succession by survivorship within the meaning af § 218 (k) of the Civil Procedure Code and is not capable of seizure and sale.

Lushington v. Samarasinghe, (2 N.L.R. 295) distinguished.

Where a fidei-commissary sells such an interest, title does not enure to the purchaser on the death of the fiduciary, and a purchaser subsequent to the death of the fiduciary has a superior title.

MOHAMEDBHOY *v.* LEBBE MARIKAR, No. 2487 , District Court, Colombo 71

(iii) A will contained the following words:—" I give and devise unto my two sisters the house and premises ..upon this condition, however, that they shall not sell mortgage or in any other manner alienate the said house and premises but that the same shall be always held and possessed by them and their *heirs in perpetuity* under the bond of *fidei-commissum*.

HELD, that the above words created a valid *fidei-commissum* operating in favour of the heirs of the fiduciaries for four generations. The words "heirs in perpetuity" contain a sufficient indication of the class in whose favour the *fidei-commissum* is created.

SELAMBRAM *v.* PERUMAL No. 32611, District Court, Colombo 104

Final Order—

See " ORDER " 53

Fiscal's Sale—

(i) *Interest of fidei-commissary*—spes successionis. *See* " FIDEI-COMMISSUM (ii) " 71

(ii) *Sale pending mortgage action—no transfer at date of action—subsequently obtained* *See* " MORTGAGE (iii) " 88

(iii) *See* " SEIZURE " 128

Frivolous and Vexatious—

See " CRIMINAL PROCEDURE CODE (iii) " 173

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Husband and Wife—

(i) Under the Matrimonial Rights and Inheritance Ordinance No· 15 of 1876, a wife, though she may be living apart from her husband by consent under a deed of separation, cannot dispose of her immovable property except with the written consent of her husband. Such consent must be given with special reference to the property sought to be disposed of.

WICKRAMARATNE *v.* DINGIRI BABA, No. 1230, District Court, Tangalle — 132

(ii) A husband is liable for the debts of his wife though incurred by her as a *publica mercatrix*.

LASCELLES, C.J.—The husband's liability under the Roman Dutch Law for his wife's trade debts is not an incident of nor derived from the community of goods. It arises from the marital power which the Civil Law attributes to the husband, a power which *Voet* observes *jure vetere parum a patria potestate distabat.*

MANAKULARATNE *v.* WICKRAMANAYAKE, No. 34,245, District Court, Colombo — 168

Hire and Service

See " PRESCRIPTION (iii)" — 91

Hypothec, tacit

See " LAST WILL (i)" — 82

Improvements

A person who has made improvements upon a land with the leave and license of the owner, is entitled to the *jus retentionis* and all the other rights of a *bona fide* possessor.

Leave and license is an intensified form of acquiescence.

MOHAMMADU *v.* BABUN, No. 11285 Court of Requests, Galle — 86

Inheritance

See " KANDYAN LAW" — 116

Injuria

See " DAMAGES" — 94

Interest affecting land

See " EVIDENCE (ii)" — 45

See " LEASE" — 121

Intestate Succession

See " KANDYAN LAW " — 116

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Irregularity

See " CIVIL PROCEDURE CODE (iii)" 55

Jurisdiction

(i) *Reference by Police Court to V. T. of charge not triable by that tribunal.*

See " POLICE COURT," "VILLAGE TRIBUNALS" 35

(ii) A Court has no power to make an order that an action shall be dismissed in the event of the plaintiff's failing to deposit the defendant's costs of the day before the next day of trial.

SUMANASARA *v.* SENEVIRATNE, No. 4774, District Court, Kalutara 99

(ii) *Court of Requests—Remainder of the term of a lease—damages for being kept out of possession before action—value of right involved.*

See COURT OF REQUESTS (ii)" 125

(iii) *See* " SEIZURE (ii)" 128

Jus Retentionis

See " IMPROVEMENTS" 86

Kandyan Law

(i) A Kandyan woman, married in bina, donated during her lifetime all her acquired property to her two sons. The sons survived their mother, but predeceased their father and maternal grandfather. In a contest between the father and the grandmother as to the succession,

Held, that the property devolved on the maternal grandmother in preference to the father.

PER LASCELLES C.J.—This principle of Kandyan Law forms an exception to the general rule of inheritance. It is thus enunciated by Sawer: " The father is not the heir of the property of his children born in a *bina* marriage, which they have acquired through their mother; the maternal uncles or next of kin on the mother's side being the heirs to such property; but the father will succeed to such children's property, if otherwise acquired.

Where *Sawer* and *Armour* are in conflict, *Sawer's* is the preferent authority.

APPUHAMY *v.* DINGIRI MENIKA (9 S.C.C. 34) followed.

RAN MENIKA *v.* MUDALIHAMY, No. 11017 Court of Requests, Kegalle 116

(ii) The offspring of a Kandyan father by a Low-Country Sinhalese woman cannot be said to be Kandyan, and is not subjct to Kandyan Law.
PER PEREIRA J.—I am aware of no rule of law

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that makes the offspring of a mixed union belong to the race of either the father or the mother.

The Kandyan Law is not what may be termed as a local law governing all persons living within a certain area. It is rather a personal law attaching to the individuals wherever they may be, belonging to a particular class or section of the Sinhalese subjects of the Crown. That being so, the mere fact that a person is born or is resident within the Kandyan provinces is insufficient to bring him within the pale of the Kandyan Law.

Section 2 of the Ordinance No. 15 of 1876 has not the effect of rendering a Low-country Sinhalese woman who marries a Kandyan liable to be regarded as a Kandyan.

MUDIANSE *v.* APPUHAMY, No. 3236, District Court, Kegalle — 160

Lease

(i) *Informal lease—can damages be claimed for breach of the lease—recovery of advance—claim for use and occupation.*

An action for damages cannot be maintained for the breach of the terms of an informal agreement of lease.

PER WOOD-RENTON, J.—Where an informal agreement for a lease has been partly executed, the lessor is entitled to a reasonable sum in respect of the actual use and occupation of the premises demised to the lessee. In the same way, where the lessee has not had the use and occupation of the premises demised in respect of which the lessor has received consideration there must be such a refund of the consideration as we have ordered to be made here. It will be open to either the lessor or the lessee for the purpose of such a claim based on use and occupation as I have just referred, to put in evidence the terms of the informal agreement itself.

DE SILVA *v.* DE SILVA, No. 33,358, District Court, Colombo — 121

(ii) *Remainder of the term of the lease—damages for being kept out of possession before action—value of right involved.*

See " COURT OF REQUESTS (ii)" — 125

Leave and License

See " IMPROVEMENTS" — 86

Legal Representative

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See "SEIZURE" 128

Lessor and Lessee

See "LEASE" 121, 125

Magistrate Police

(i) There is nothing in § 197 (1) Criminal Procedure Code which either expressly or by necessary implication requires a Police Magistrate to hear every witness whom a complainant may desire to call before exercising the powers with which the section has invested him.

VELUPILLAI *v.* CASIPPILLAI, No. 6705, Police Court, Jaffna 49

(ii) *Police Magistrate refusing summons—accused not before Court—no prosecution.*

See "MALICIOUS PROSECUTION 151

Malice, proof of

See "DAMAGES" 94

Mallicious Arrest

See "DAMAGES" 94

Malicious Prosecution

(i) An action for malicious prosecution does not lie where the Police Magistrate, having gone through the preliminaries required by the Code, refuses summons on the accused.

In order that the proceedings may constitute a prosecution the accused should be before the Court.

In an action for damages for injury caused by proceedings before prosecution the amount of evidence required to prove that the plaintiff was innocent would be much greater than in a case of malicious prosecution, in which case the order of the Criminal Court discharging him coupled with a denial on oath that he committed the offence would create a strong presumption in his favour.

ADRIAN *v.* NICHOLAS, No. 11212, District Court, Galle 151

(ii) *Seizure of property without warrant—is proof of malice necessary—*

See "DAMAGES" 94

Marriage

Offspring of a mixed union.

See KANDYAN LAW (ii)" 160

Married Woman

See "HUSBAND AND WIFE" 132, 168

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Material Irregularity

See " CIVIL PROCEDURE CODE (iii)" 55

Minor

A minor cannot adiate an inheritance and is not liable to be sued for the debts of the ancestor.

ROBERT *v.* ABEYWARDENE, No. 10990, Court of Requests, Galle, 23

Misconduct, Legal

See " ARBITRATOR" 102

Mischief

See " PENAL CODE (ii)" 163

Mortgage

(i) In the absence of a special direction by the judge, it is quite open to the mortgagee-creditor to exercise his own discretion as to the order in which the lands shall be sold.

The mere fact that the lands are scheduled in the decree in a certain order is not tantamount to a direction to sell them in that order.

WICKREMESINGHE *v.* PUNCHI NONA, No. 5246, District Court, Matara 43

(ii) *Notarial mortgage bond—subsequent written agreement to change mode of payment—admissibility in evidence.*

See " EVIDENCE (ii)" 45

(iii) *Action by purchaser at execution sale pending mortgage action against purchaser under mortgage decree—no Fiscal's transfer at date of action—sufficient if obtained before trial.*

The right obtained by a purchaser at a sale in execution, during the pendency of a mortgage action is subject to the result of the mortgage action and subject to the decree therein.

He is not entitled to a declaration of title and an order of ejectment as against the purchaser under the mortgage decree.

SAMIAPPU *v.* DISSANAYAKE (3 Browne 82) followed,

SILVA *v.* SILVA, No. 26749, Court of requests, Colombo. 88

(iv) *Action by Mortgagors for cancellation of bond—whether mortgagee bound to claim in reconvention money due—res judicata.*

See " CIVIL PROCEDURE CODE (i).' 26

Municpal Council's Ordinance

In a prosecution of the appellants under § 157 of

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the Ordinance No. 6 of 1910 for having failed to remove within 14 days of notice an alleged projection into the street, they set up a *bona fide* claim of right to the projection based on long possession.

Held, that the provisions of § 6 of the Road (amendment) Ordinance, which enacted that the laws of prescription do not apply to roads, were fatal to the defence set up by the appellants.

SOURJAH *v.* UMUL FALLEELA, No. 427, Municipal Court, Colombo ... 112

Oaths' Ordinance

See " DECISORY OATH" ... 37 175

Obstruction

See " RIGHT OF WAY" ... 28

Officer Administering Oath

See " DECISORY OATH" ... 37

Order, Final

(i) *See* " POLICE COURT," " APPEAL" ... 53

(ii) *See* " JURISDICTION" ... 99

Ordinances

(i) *Stamp Ordinance No. 22 of 1909.*

See " CHEQUE" ... 11

(ii) *Oaths' Ordinance, No. 9 of 1895.*

See " DECISORY OATH" ... 37, 175

(iii) *Ordinance re frauds, No. 7 of 1840.*

See " EVIDENCE (ii)" ... 45

See " FIDEI-COMMISSUM (ii).' ... 71

See " LEASE" ... 121

(iv) *Land Registration Ordinance*, No 14 of 1891.

See " LAST WILL (i)" ... 82

(v) *Prescription Ordinance*, No. 22 of 1871.

See 'PRESCRIPTION (iii)"

(vi) *Municipal Councils' Ordinance, No. 6 of 1910* ... 112

(vii) *Road (Amendment) Ordinance, No. 23 of 1910* ... 112

(viii) *Matrimonial Rights and Inheritance Ordinance, No. 15 of 1876.*

See HUSBAND AND WIFE" ... 132, 168

See " KANDYAN LAW" ... 160

(ix) *Sale of goods' Ordinance, No. 11 of 1896.*

See " SALE" ... 154

(x) *Arbitration Ordinance, No. 15 of 1866,*

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See " ARBITRATION" 157

(xi) *Partition Ordinance No. 10 of 1863.*

See " PARTITION" 149, 169

(xii) *Police Ordinance*, No. 16 of 1865.

See POLICE COURT" 53

Partnership

Agreement to refer matters in dispute to arbitration —discretion of Court—charges of fraud.

See " ARBITARTION" 157

Partition

(i) *Co-owner witholding consent to build on common land—remedy—partition action.*

See CO-OWNER (i) 149

(ii) An alienation pending an action for partition of the entirety of the action does not contravene the provisions of § 17 of Ordinance 10 of 1863.

PER PEREIRA J.—That section (viz. § 17) provides that it shall not be lawful for " any of the owners to alienate his share or interest." The words " any of the owners" clearly imply that the case contemplated is a case of property owned by several owners, and hence the word " interest" can only mean some interest short of absolute ownership of the entirety of the property.

JANGO APPU *v.* SOMAWATHI, No. 11354, District Court, Galle, 166

Passing off

See " TRADE-MARK" 137

Penal Code

(i) *§§ 343 and 409—Reference by Magistrate to the V.T. of case not triable by that tribunal.*

See POLICE COURT" 53

(ii) *§409—co-owner cutting down fence in assertion of right—mischief.*

A person can be said to be guilty of mischief only if he acts spitefully, maliciously or wantonly. He should either intend to cause wrongful loss or know that wrongful loss is likely to be caused to some person.

A co-owner who removes a fence in the assertion of a real or fancied right to an enclosed portion of what is claimed as common property does not thereby commit mischief.

POROLIS *v.* ROMANIS, No. 41,952 Police Court, Panadura 163

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Penalty

Is penalised contract illegal?

See "CHEQUE" 11

Police Ordinance

Offence under § 70 not triable by V.T.

See "POLICE COURT" 53

Police Court

An order of transfer to the Village Tribunal of a charge which that Tribunal has no power to entertain is, as regards that charge, a final order within the meaning of § 338 of the Criminal Procedure Code, and is appealable.

Where the Magistrate transferred to the Village Tribunal charges under §§ 343 and 409 of the Penal Code and § 70 of the Police Ordinance.

Held, that the transfer was wrong, as the charge under § 70 is not within the jurisdiction of the Village Tribunal.

GOONEWARDENE *v.* SILVA, No. 18035, Police Court, Negombo 53

Police Officer, Statement

See "CONFESSION" 61

Possessor, bona fide

See "IMPROVEMENTS" 86

Post-dated Cheque

See "CHEQUE" 11

Postponement of Case

See "JURISDICTION" 99

Prescription

(i) *See* "RIGHT OF WAY" 28

(ii) The right to recover any one payment of an annuity accrues whenever it becomes due, and prescription begins to run from the date when the first annuity becomes payable.

GAUDER *v.* DISSANAYAKE (4 Bal. 122) followed.
FONSEKA *v.* FERNANDO, No. 4827, District Court, Kalutara 82

(iii) *Action to recover money advanced on a written agreement for hire and service.*

Where a sum of money was advanced by A to B, in consideration of which B, entered into a written contract of hire and service with A for a term of years, and where it was stipulated that the sum of money advanced was to be deducted from the total amount of wages due, at the expiration of the term of the contract.

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Held, that the claim for the return of the money advanced falls under § 7 of Ordinance 22 of 1871, and is prescribed in 6 years from the cause of action.

JAMES APPU *v.* DE SILVA (7 S.C.C. 129) and THOMASSIE *v.* KANAVATHIE (5 S.C.C. 174) differentiated.

SILVA *v.* ASOHAMY, No. 19230, Court of Requests, Negombo ... 91

(iv) *Laws of prescription not applicable to roads.*

See " MUNICIPAL COUNCIL'S ORDINANCE" ... 112

Probate

See " WILL" ... 82

Projection over Street

See " MUNICIPAL COUNCIL'S ORDINANCE," ... 112

Publica Mercentrix

See " HUSBAND and WIFE," ... 168

Receiver—Arbitr.tion.

The claims in the respondent's plaint for the appointment of a receiver and for the grant of an injunction deal with matters beyond the competence of arbitrators, and can only be satisfactorily disposed of by the ordinary tribunals.

SOYSA *v.* RANESINGHE, No. 2154 District Court, Kandy ... 157

Registration

(i) *See* " VENDOR and VENDEE," ... 71

(ii) A probate of a will is a registrable instrument under § 16 of the Registration Ordinance No. 14 of 1891, and the provisions of the following section of the Ordinance are applicable to it.

FONSEKA *v.* FERNANDO, No. 4827, District Court, Kalutara ... 82

Rei Vindicatio action

Action by purchaser at execution sale pending nortgage action against purchaser under mortgage decree.

See " MORTGAGE (iii)." ... 88

Res judicata

(i) *See* " EVIDENCE, (i)" ... 1

(ii) In an action by a mortgagor to have a mortgage bond cancelled and discharged, the mortgagee is not bound to claim in reconvention the money due on the bond, and a subsequent ac-

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tion on the bond is not barred by §207 or § 817 of the Civil Procedure Code.

PERERA *v.* PESONAHAMY, No. 303, Court of Requests, Gampola 26

Res inter alios acta

See " EVIDENCE (i)" 1

Right of Way

If a person who is entitled to a right of way finally and definitely agrees to accept a new route in lieu of the old route, such permanent change would bind him to the extent of disentitling him to use the old route again except by a fresh agreement.

A servitude is extinguished by abandonment or release. Abandonment or release is a question of fact in each case. The mere fact of a new line of way being adopted in lieu of the old route is not in itself proof of abandonment of the servitude along the old way. The length of time during which the new route has been used instead of the old one would be a relevant fact for consideration in connection with the question of abandonment. But if the substitution was made under such circumstances that the inference of abandonment can be drawn the question of time will not be of much consequence.

Where a right of way has been acquired by prescription and a new route has been substituted by agreement for the old route, the benefit of the old possession would attach to the new route and a prescriptive right can be exercised over the new route.

Where both the old way and the substituted way are obstructed and an action is brought in respect of the old way, and the Court finds that the right to use the same can no longer be maintained, the action should not be dismissed, but the plaintiff should be given an opportunity of amending his pleadings and claiming a declaration in respect of the substituted way.

COSTA *v.* LIVERA, No. 18621, Court of Requests, Negombo 28

Sale in execution

(i) In the absence of a special direction by the Judge, it is quite open to the mortgagee-creditor to exercise his own discretion as to the order in which the lands shall be sold.

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WICKREMESINGHE *v.* PUNCHI NONA, No. 2465 District Court, Matara 43

(ii) *Suit by judgment. Debtor to set aside sale for irregularity proper procedure to move in same action.*

See " CIVIL PROCEDURE CODE (ii)" 55

Sale of goods 154

Seizure

(i) *Property seized without warrant or order of Court.* *See* " DAMAGES (i)" 94

(ii) *See* " FIDEI-COMMISSUM (ii)" 71

(iii) Where after the death of the iudgment-debtor, the judgment-creditor seized and sold in execution certain property belonging to the estate of the judgment-debtor without making the legal representative of the iudgment-debtor a party on the record in terms of § 341 of the Code.

Held, that such seizure and sale were bad.

It is no answer that the sale was confirmed by the Court, in as much as the property was never brought within the jurisdiction of the Court by means of a lawful seizure, and the order confirming the sale was made under the mistaken belief that the Court had jurisdiction, which it in fact had not, to confirm the sale.

OMER *v.* FERNANDO, No. 31771 District Court, Colombo 128

Servitude

See " RIGHT OF WAY" 28

Stamp Ordinance

(i) § 64—*See* " CHEQUE" 11

(ii) The value of an estate for the purpose of ascertaining probate or administration duty is its value at the death of the deceased, and not at the date of filing of the final accout.

In re Last Will of Don Mathes de Silva, No. 486, District Court, Tangalle 41

Statement to a Police Officer

See " CONFUSION" 61

Succession

See " KANDYAN LAW" 116

Trade Mark

The plaintiffs, in an action for passing off, sold their soap in card-board boxes of practically the same size shape, and construction as the defendants. The plaintiffs' box bore on the lid, both outside and inside, a coloured label with the device of a lion leaping out of a bam-

boo jungle and the words " Lion Soap, George Dralle, Hamburg." The defendants' box bore on the lid, both outside and inside, a coloured label consisting of a representation of galloping race-horses with their jockeys, together with the words " Finest Jockey Club Soap, Gottlieb Taussig, Soap Makers to the Imp. et Roy Court, Vienna." The sides of the box were completely covered with labels representing race-horses. The defendant's cakes of soap were about the same size as the plaintiffs'. They were enclosed in red silk or satin wrappers of nearly the same shade, they were tied with the same gold-coloured cord, and they bore gold-coloured seals which bore a general resemblance to the seals set as the plaintiff's soap though the impressicn on the seals was different. Both soaps were heavily scented. The defendants' cake of soap bore a conspicuous label similar to that on the box, and the plaintiffs' cake of soap bore this label equally conspicuously on each cake of the plaintiffs, and defendants' soap there was the device of the lion and of the horses and jockeys pasted over the red satin cover.

Held, that the plaintiffs were not entitled to an injunction.

Held further, (1) that the silk-wrapping was not distinctive of the get-up of the plaintiffs' soap.
(2) that as this was soap manufactured out of the Island, evidence of user outside Ceylon was admissible.

PER LASCELLES C..J—In my opinion the plaintifls' action fails. I arrive at this conclusion on the broad ground that there is no proof that anyone was deceived into buying the defendants' soap for that of the plaintiffs and that the defendants soap is not calculated to deceive the public in as much as the difference between the two soaps is conspicuous and apparent to purchasers. None, educated or uneducated, who took into his hand a cake of the "Jockey Club Soap" could believe that that soap was the " Lion Soap," if he had ever seen the "Lion Soap."

PER WOOD-RENTON J.—Proof of instances of actual deception is, of course, not necessary in cases of this kind any more than proof of fraud; but where the alleged passing off consists in the adoption by one trader of an ordinary device, proof that it has actually been found to be deceptive is of considerable value.

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DRALLE *v.* EBRAMJEE, No. 34175 District Court, Colombo 137

Use and Occupation

See " LEASE" 121

See " COOWNER"

Vendor and Vendee

If the 5th defendant, when he purchased, failed to search the register or bought the share notwithstanding the registration, he accepted a serious risk ; but I fail to see that he is in the same position as a vendor who when he has no title to give, and subsequently when he has obtained title, repudiates the sale and sets up his newly acquired title against the purchaser.

The only remedy of the party defrauded is to sue for damages against the vendor.

See " FIDEI-COMMISSUM (ii)"

MOHAMEDBHOY *v.* LEBBE MARIKAR, No. 24875 District Court, Colombo 79

Vexatious Charge

See " CRIMINAL PROCEDURE CODE (i)" 41

Village Tribunal

An order of transfer to the Village Tribunal of a charge which that Tribunal has no power to entertain is, as regards that charge, a final urder within the meaning of §338, Criminal Procedure Code, and is appealable.

Where the Magistrate transferred to the Village Tribunal charges under §§ 343 and 409 of the Penal Code and § 70 of the Police Ordinance.

Held, that the transfer was wrong, as the charge onder § 70 is not within the jurisdiction of the Village Tribunal.

GOONEWARDENE *v.* SILVA, No. 18035 Police Court Negombo. 53

Will, Last

(i) The plaintiff, who was an annuitant under the will of the testator, and who was in a former action declared entitled to a tacit hypothec over the residuary estate of the testator, sued the defendant for a declaration that a land purchased by the latter from the residuary legatee was subject to the plaintiff's hypothec. Neither the probate of the will creating the annuity nor the tacit hypothec was registered, but the defendant's conveyance was registered.

Held, that the defendant's interest under his deed is adverse to that of the plaintiff under the will and that the tacit hypothec created by the will in favour of the plaintiff is void by reason

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of the registration of the defendant's conveyance.

A probate of a will is a registrable instrument—under § 16 of the Registration Ordinanee No. 14 of 1891, and the previous of the following Section of the Ordinanee are applicable to it.

PER LASCELLES, C.J.—The will is void only *quoad* the adverse interest claimed by the defendant, that is, the right to hold the land free of the tacit hypothee created by the will.

PER WOOD-RENTON, J.—The right to recover anyone payment of an annuity accrues whenever it becomes due and prescription begins to run from the date when the first annuity becomes payable.

GAUDER *v.* DISSANAYAKE (4 Bal 122) followed.

FONSEKA *v.* FERNANDO, No. 4127, District Court, Kalutara 82

Writ

See " SEIZURE" 128